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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 20

RAYBESTOS-MANHATTAN, INC., PETITIONER,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

PETITION FOR CERTIORARI FILED APRIL 6, 1935.

CERTIORARI GRANTED MAY 20, 1935.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 850

RAYBESTOS-MANHATTAN, INC., PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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[fol. 1] **IN COURT OF CLAIMS**

No. 42580

RAYBESTOS-MANHATTAN, INC., a Corporation of the State of New Jersey,

v.

THE UNITED STATES OF AMERICA

1. PETITION—Filed January 9, 1934

To the Honorable the Judges of the Court of Claims:

The claimant, Raybestos-Manhattan, Inc., respectfully represents:

I. That claimant is a corporation duly organized and existing under and by virtue of the Laws of the State of New Jersey, having its principal office at 61 Willett Street in the City of Passaic, in said State, and is engaged in the general business of making and selling asbestos and other materials.

II. That, for the purpose of carrying on said business, claimant was created and organized, in 1929, as a new company, by or through members of three separate committees, who at that time represented substantially all the stockholders of three separate corporations, legal entities, which [fol. 2] then and for some time prior thereto were either complementing or supplementing each other's work or were competing with each other in such general business, the stockholders of, viz: The Raybestos Company, a Connecticut corporation, the United States Asbestos Company, a Pennsylvania corporation, and The Manhattan Rubber Manufacturing Company, a New Jersey corporation, which stockholders had developed previous to the forming of said new company a plan for combining the businesses of all three of said separate corporations into a single enterprise, for their mutual advantage and the benefit and the promotion of the general business in which each stockholder held a capital interest. The plan so developed, to merge these interests of like kind, had its conception at a meeting of individuals holding large or majority blocks of stock in

the several corporations; and it was prompted, on the one hand, by the mutual desire of such stockholders to coordinate, complement and consolidate the businesses and operations of the several corporations so as to effectuate certain economies in the manufacturing and the selling of their products, and, on the other hand, by their further desire to have their several capital interests so merged that such interest of each might represent in the future a share or shares in a better rounded and a more complete industrial unit. Thereupon, to-wit: on or about the 14th day of May, 1929, a memorandum of accord among said individuals was drafted, in which were embodied the basic elements of the plan of merger suggested by them, and same was soon thereafter referred to all holders of the common stock of the several corporations for their approval thereof and acquiescence therein or for their disapproval and rejection. A copy of which Memorandum of Agreement is hereunto at-[fol. 3] tached, made a part hereof and marked Exhibit A. Said Memorandum, as subsequently amended by the parties interested therein, was put in the form of a printed document, dated May 22, 1929, and entitled "Plan and Agreement," and a copy was submitted to each and every holder of said common stock with a form-letter, also dated May 22, 1929, over the names of the respective presidents of the several corporations. The general form and the substance of both the memorandum and the letter of transmittal were the same in each instance, so far as the differences in corporate names, names of stockholders addressed, names of corporate executive officers, and names of proposed members of the three sets of committee members, permitted. Copies of said "Plan and Agreement" and of said form-letter, as sent to each and every common-stockholder of the several corporations respectively, are hereunto attached, made a part hereof, and are marked Exhibits B., C., and D., respectively. Approval of the plan and agreement, through the expressed consent and the acquiescence of the several common-stock holders of the several corporations, and by all the owners of the common stock of the said corporations depositing their respective holdings with the several committees, designated to control procedure and to effect the merger of their capital interests, and to exchange the shares of common stock aforesaid for shares of a corporation, called in the Agreement "the New Company," led directly

to and resulted in the creation and organization in 1929 of claimant by or through the members of the three separate committees, they functioning, for such purpose, as a general committee representing and acting for all common-stock holders of each of the three separate corporations.

[fol. 4] III. That in consideration of all the holders of common stock of The Raybestos Company, one of the constituent companies in such merger of capital interests, severally depositing their respective shares with the committee representing that corporation, pursuant to the provisions of the "Plan and Agreement" that had been submitted to them by the president of The Raybestos Company, and in consideration that their individual capital interests collectively then represented all the assets of The Raybestos Company, subject to all of the obligations and liabilities of that corporation, all of which entered into and became a part of said merger, the shares of common no par value stock of "the New Company" to be issued for shares of the common stock of The Raybestos Company, to-wit: 267,012 shares, were issued by claimant to said stockholders direct, with the consent and at the request of the said committee, each of said stockholders receiving through the issue of said 267,012 shares one or more certificates of the Raybestos-Manhattan, Inc., registered in the name of the stockholder for as many of said common no par value shares as the shares of The Raybestos Company common stock deposited in negotiable form by the stockholder entitled the stockholder to receive under said "Plan and Agreement."

IV. That in consideration of all the holders of common stock of the United States Asbestos Company, another of the constituent companies in such merger of capital interests, severally depositing their respective shares with the committee representing that corporation, pursuant to the provisions of the "Plan and Agreement" that had been submitted to them by the president of the United States Asbestos Company, and in consideration that their indi-[fol. 5] vidual capital interests collectively then represented all the assets of the United States Asbestos Company, subject to all of the obligations and liabilities of that corporation, all of which entered into and became a part of said merger, the shares of common no par value stock of "the New Company" to be issued for shares of the common stock

of the United States Asbestos Company, to-wit: 114,000, in the aggregate, were issued by claimant to said stockholders direct, with the consent and at the request of the said committee, each of said stockholders receiving through the issue of said 114,000 shares one or more certificates of the Raybestos-Manhattan, Inc., registered in the name of the stockholder for as many of said common no par value shares as the shares of the United States Asbestos Company common stock deposited in negotiable form by the stockholder entitled the stockholder to receive under said "Plan and Agreement."

V. That, thereafter, the Manhattan Rubber Manufacturing Company, the remaining of the constituent companies in such merger of capital interests, effected a merger with claimant under the Laws of the State of New Jersey, each being a corporation of that State, and since then claimant has carried on combined the businesses which the three merging or uniting corporations had previously conducted under separate managements.

VI. That by notice and demand, dated February 3, 1933 (Miscellaneous—December, 1932, F-404-L-O), the Collector of Internal Revenue, at Newark, N. J., advised claimant of there having been assessed against claimant, by reason of the issuing of its common no par value shares, as aforesaid, stock transfer stamp taxes aggregating the sum of $7,620.24, a copy of which notice and demand is hereunto [fol. 6] attached, marked Exhibit E., and made a part hereof.

VII. That claimant, thereafter, believing the taxes had been illegally, erroneously and wrongfully assessed, filed with said Collector a claim (No. M-41733) for the abatement of the taxes so assessed, but at a hearing thereon held in the offices of the Commissioner of Internal Revenue, at Washington, D. C., on May 4, 1933, it was suggested by Government representatives there present that it might inure to the benefit of claimant protesting against the legality of the assessment, and afford to claimant a more satisfactory procedure for the determination of the question involved, should claimant pay the taxes assessed, with any interest thereon, if accrued, and afterwards file a claim for the refund of the taxes and interest paid.

VIII. That, afterwards, to-wit: on the 8th day of May, 1933, claimant, acting in conformity with the suggestion aforesaid, paid to said Collector of Internal Revenue said sum of $7,620.24, together with $165.11 as the interest accrued thereon to date of payment, or a total of $7,785.35, and procured the Collector's Paid Stamp upon the origi l "Notice and Demand for Tax."

IX. That, afterwards, to-wit: on the 15th day of May, 1933, claimant executed a claim for refund of tax wrongfully assessed and illegally collected, and later filed same with said Collector of Internal Revenue, a copy of which claim is hereunto attached, made a part hereof, and marked Exhibit F.

X. That, thereafter, to-wit: on the 12th day of December, 1933, the Commissioner of Internal Revenue, acting by and through his deputy, disallowed the claim for refund so filed by claimant. A copy of the Commissioner's letter, dated Dec. 12, 1933, addressed to Raybestos-Manhattan, Inc., and [fol. 7] advising claimant of the rejection of its said claim, is hereunto attached, made a part hereof, and marked Exhibit G.

XI. That the provision of law under which said assessment was made, and upon which the petitioner claims such refund, is Schedule A-3 of Section 800 of the Revenue Act of 1926 (44 Stat. 99, 101).

XII. That said total sum of $7,785.35, with lawful interest thereon from said 8th day of May, 1933, is now wrongfully retained by the United States of America and withheld from claimant against its will, and, therefore, claimant brings this suit based upon the facts herein stated and hereunto appended and the rights secured to claimant under the Acts of Congress in such case made and provided.

XIII. That no action has been had on this claim in Congress or by any of the Departments, other than is herein stated, that claimant has at all times borne true allegiance to the Government of the United States, that it has not in any way voluntarily aided, abetted or given encouragement to rebellion against such Government, that it is and always has been the sole and absolute owner of the claim here presented, that it has made no transfer or assignment of said claim or of any part thereof or of any interest

therein, and that it is justly entitled to the amount herein claimed from The United States of America after allowing all just credits and set-offs.

XIV. That claimant believes the facts as herein stated to be true.

Wherefore, the premises considered, claimant, as your petitioner, prays judgment against The United States of America for the full sum of Seven Thousand, Seven Hundred Eighty-five Dollars and Thirty-five Cents ($7,785.35), [fol. 8] with lawful interest thereon from the said 8th day of May, 1933, together with its reasonable costs and disbursements herein, and for such other and further relief as to this Honorable Court seems right and equitable.

And, your petitioner will ever pray, etc.

Raybestos-Manhattan, Inc., By A. F. Townsend, Chairman of the Board. By F. L. Curtis, Treasurer. (Raybestos-Manhattan, Inc., Corporate Seal, 1929, New Jersey.) Attest: Morton F. Judd, Secretary.

[fol. 9] *Duly sworn to by F. L. Curtis. Jurat omitted in printing.*

Charles H. LeFevre, Howard S. LeRoy, Attorneys for Claimant. Attorneys' Address: LeFevre & LeRoy, 400-1-2 Hibbs Building, Washington, D. C. S. R. Zimmerman, Esquire, 50-52 North Duke Street, Lancaster, Pa., of Counsel.

[fol. 10] EXHIBIT "A" TO PETITION

Memorandum of Agreement made this 14th day of May, 1929, by and between The Raybestos Co., a Connecticut corporation, party of the first part (hereinafter referred to as Raybestos), The Manhattan Rubber Mfg. Co., a New Jersey corporation, party of the second part (hereinafter referred to as Manhattan) and United States Asbestos Co., a Pennsylvania corporation, party of the third part (hereinafter referred to as United States), Witnesseth:

Raybestos has outstanding capital stock consisting of: 8% cumulative preferred stock, ($100 par value) approxi-

mately 6,000 shs. Common Stock ($25 par value) 118,672 shares.

Manhattan has outstanding capital stock consisting of: common stock ($25 par value) 200,000 shares.

United States has outstanding capital stock consisting of: 7% cumulative preferred stock, (par value $100) approximately 4,750 shs. Common stock (no par value) 100,000 shares.

None of said companies will have outstanding at the time of the consummation of the transactions herein provided for any funded debt or secured debt of any sort. Each of the companies has exhibited to the other balance sheets setting forth all assets and liabilities and income statements for recent years.

The officers of each company have agreed that it is for the best interest of each company and its stockholders that the assets and businesses of such companies should be com- [fol. 11] bined into a single company and that stock of such company should be substituted for stock of such companies on the basis set forth below.

Now, therefore, each of said companies, in consideration of the agreements of the others, hereby agrees to the following plan, subject to the necessary action by directors and stockholders:

1. A consolidated company shall be formed which either directly or through subsidiaries, using such method as may be approved by counsel, shall own the entire assets of each of the above named companies. Such consolidated company may be any one of the existing companies or may be a new corporation formed for the purpose under the laws of such state as the parties shall determine.

2. The capitalization of the consolidated company shall consist of 1,000,000 shares of common stock, such shares to be of no par value and all of one class. Of such authorized stock 631,012 shares shall be issued in exchange for or replacement of the shares of common stock of the companies now outstanding, and 45,000 shares shall be sold for cash, as hereinafter provided.

3. The basis of the issue of stock of the consolidated Company for or in replacement of stock of the above named companies shall be as follows:

(a) In the case of Raybestos, for the outstanding common stock of that Company, consisting of 118,672 shares, there shall be issued 267,012 shares of the consolidated company, each stockholder of Raybestos receiving 2-25/100 shares of the consolidated company for each share of Raybestos common stock.

(b) In the case of Manhattan, for the outstanding common stock of that company, consisting of 200,000 shares, there shall be issued 250,000 shares of the consolidated [fol. 12] company, each stockholder of Manhattan receiving 1-25/100 shares of the consolidated company for each share of Manhattan common stock.

(c) In the case of United States, for the outstanding common stock of that company, consisting of 100,000 shares, there shall be issued 114,000 shares of the consolidated company, each stockholder of United States receiving 1-14/100 shares of the consolidated company for each share of United States common stock.

4. The consolidated Company will sell to Hayden, Stone & Co., Hemphill, Noyes & Co., and The Equitable Trust Company, all of New York City, or their nominees, 45,000 shares of stock for $30 per share in cash, under the terms of an agreement substantially in the form hereto annexed, the proceeds of such sale to be used to replace cash required for the retirement of the existing preferred stocks of Raybestos and United States, the balance of such proceeds to be used for the general purposes of the corporation.

5. Each of the parties hereto will take such steps as may be necessary or expedient, including action by directors and stockholders, to effect the carrying out of the plan herein agreed to as promptly as may be practicable. Each of the parties shall by notice to the others promptly designate a representative to constitute a committee for the purpose of carrying out the plan. The consolidated company shall pay all expenses of every nature involved in carrying out the plan and the issue and delivery of its stock.

6. The plan shall be carried out as soon as practicable, taking into account the proceedings of directors and stockholders required by law, and the requirements of the re-

[fol. 13] spective certificates of incorporation and by-laws of the parties hereto. Pending the carrying out of the plan the business of each of the parties shall be carried on in the normal way. No party shall make any distribution to its stockholders, other than dividends at the rates hitherto established, or incur any unusual liability or commitment, except that Raybestos and United States may take such steps as may be necessary to retire their existing preferred stocks, and that any party may pay off existing mortgages or liens on its property.

In witness whereof, the parties hereto have executed this agreement on the day and year first above written.

The Raybestos Co. (Signed) by S. Simpson; The Manhattan Rubber Mfg. Co. (Signed) by A. F. Townsend; United States Asbestos Co. (Signed) by S. R. Zimmerman.

[fol. 14] EXHIBIT "B"

The Raybestos Company, Bridgeport, Connecticut

Office of the President

To holders of common stock of the Raybestos Company:

Representatives of your Company and of The Manhattan Rubber Manufacturing Company, a New Jersey corporation, and United States Asbestos Company, a Pennsylvania corporation, have developed a plan for combining the businesses of such companies. Such plan, it is believed, will prove of great advantage to the business and stockholders of all three companies. Under this plan, described in the accompanying "Plan and Agreement" to which you are referred, it is contemplated that a corporation (hereinafter called "the New Company") will acquire, directly or indirectly, by purchase, merger, consolidation or otherwise, all of the assets of the three companies, and will assume all of their obligations and liabilities.

The New Company is to have an authorized capital consisting of 1,000,000 shares without par value, of which it is planned to issue 631,012 shares in replacement of the shares of stock of The Raybestos Company, The Manhat-

tan Rubber Manufacturing Company, and United States Asbestos Company. Prior to the consummation of the Plan the outstanding issues of Preferred Stock of The Raybestos Company and United States Asbestos Company will be called for redemption. The holders of Common Stock of the three companies will receive Common Stock [fol. 15] of the New Company in replacement of their present stock on the following basis:

	Shares of Common Stock Now Outstanding	Shares of Common Stock of New Company
2-25/100 shares of stock of the New Company for each share of Common Stock of The Raybestos Company.	118,672 ($25 par value) (The Raybestos Company).	267,012
1-25/100 shares of stock of the New Company for each share of stock of The Manhattan Rubber Manufacturing Company.	200,000 ($25 par value) (The Manhattan Rubber Manufacturing Company).	250,000
1-14/100 shares of stock of the New Company for each share of Common Stock of United States Asbestos Company.	100,000 (no par value) (United States Asbestos Company).	114,000

An additional 45,000 shares of Common Stock of the New Company is also to be sold for cash to replace funds required for the retirement of Preferred Stock of existing companies and for the general purposes of the New Company.

Upon the consummation of the Plan, the New Company will have no funded debt and no preferred stock and will have ample working capital. Combined earnings of the three companies for 1928 available for dividends, as shown by their audited statements, amounted to $2,465,586, equivalent to $3.65 per share for the year 1928 on the stock of the New Company which will be outstanding upon the consummation of the Plan. Combined earnings for the first quarter of 1929, as reported by the three companies, amounted to $888,417, equivalent to $1.31 per share for such quarter on such stock. It is expected that the New Company will inaugurate a dividend policy resulting in a return to each stockholder on his holdings in the New Company not less than the dividend return on his holdings of [fol. 16] common stock in the present company.

It is believed that combining the business of the three companies will bring about substantial economies both in manufacturing and selling expenses. The combined business will also make a better rounded and more complete industrial unit. With a view of furnishing the stockholders a wider market for their holdings, application will be made to list the stock of the New Company on the New York Stock Exchange.

Messrs. Simpson and Hincks of your Board of Directors and Mr. Clifford Hemphill will serve as a Committee to receive deposits of stock under the Plan and have caused to be prepared the Plan and Agreement under which such deposit may be made. Depositors will not be called upon to pay any compensation or expenses of the Committee or any other expenses.

Holders of more than a majority of the Common Stock of your Company and holders of more than a majority of the common stock of each of the other two companies have already approved the Plan and have agreed to deposit their stock. Prompt cooperation by all stockholders in the deposit of their stock will greatly facilitate the consummation of the Plan, and is necessary to assure participation in the Plan.

As provided in the Agreement the registered holders of Certificates of Deposit will receive dividends paid on the deposited stock pending the consummation of the Plan. Upon deposit of the stock the Depositary will issue Certificates of Deposit which will be transferable in the same way as the stock certificates. Application will be made to admit such Certificates of Deposit to trading on the New York Curb Market.

[fols. 17 & 18] Deposited stock certificates must be duly endorsed in blank for transfer or accompanied by duly executed stock powers and signatures must be guaranteed by a New York City Bank or Trust Company or a bank or trust company having a New York City correspondent or by a New York Stock Exchange firm. Transfer tax stamps need not be attached, except where it is requested that a Certificate of Deposit be issued in the name of some one other than the holder of record of the deposited stock. Stockholders should forward their stock certificates with the enclosed letter of transmittal immediately to Guaranty Trust Company of New York, Trust Depart-

ment, 140 Broadway, New York City, Depositary. For the convenienec of stockholders arrangements have been made whereby stockholders may deliver their stock certificates to The First National Bank of Bridgeport, Bridgeport, Connecticut, or Hincks Bros. & Co., Bridgeport, Connecticut, who will forward the same to the Despositary.

Deposit of stock will constitute assent to the Plan and Agreement. If the Plan should fail of consummation because of insufficient deposited stock or otherwise, the deposited stock will be returned to the depositors without charge.

The Committee has fixed June 17, 1929, as the last day for making deposits under the Plan.

The Board of Directors of your company by a resolution unanimously adopted have recommended that the Common Stockholders of the company deposit their stock under the Plan. On behalf of the Board of Directors and as President of your company I recommended that you promptly deposit your stock.

May 22, 1929.

Sumner Simpson, President.

NOTE.—Requests for further information should be addressed to the Secretary of the Committee, Mr. George K. Graves, Jr., 15 Broad Street, New York City.

[fols. 19 & 20] The Raybestos Company, Common Stock. Plan and Agreement, Dated May 22, 1929. Sumner Simpson, Clifford Hemphill, William T. Hincks, Committee. George K. Graves, Secretary, 15 Broad Street, New York City. Depositary, Guaranty Trust Company of New York, New York City, N. Y.

[fol. 21] Plan

It is proposed that all of the business and assets of The Raybestos Company, a Connecticut corporation (herein and in the annexed Agreement called "the Raybestos Company"), The Manhattan Rubber Manufacturing Company a New Jersey corporation (herein and in the annexed Agreement called "the Manhattan Company") and United States Asbestos Company, a Pennsylvania corporation (herein and in the annexed Agreement called "the United States Company") shall be acquired directly or indirectly,

by purchase, merger, consolidation, or otherwise, by a corporation (herein and in the annexed Agreement called "the New Company"), the New Company to assume all of the liabilities and obligations of the Raybestos Company, the Manhattan Company and the United States Company.

The New Company shall have an authorized capital of 1,000,000 shares of common stock, without par value, and may be a new corporation organized under the laws of any state selected by the Committee constituted by the Agreement annexed hereto or, at the election of such Committee, the New Company may be any one of the above-named companies with appropriate change of its present capital structure and charter.

The stockholders of the above-named companies are to receive stock of the New Company on the following basis:

2¼ shares of common stock of the New Company for each share of common stock of the Raybestos Company.

[fol. 22] 1¼ shares of common stock of the New Company for each share of stock of the Manhattan Company.

1-14/100 shares of common stock of the New Company for each share of common stock of the United States Company.

In lieu of any fraction of a share of common stock of the New Company deliverable to any stockholder of any of the above-named companies, there will be issued non-voting and non-dividend bearing common stock scrip, exchangeable, in amounts calling for one or more full shares, for a certificate for such share or shares.

On the above basis there will be required for distribution to the common stockholders of the Raybestos Company, the Manhattan Compan yand the United States Company an aggregate of 631,012 shares of common stock of the New Company. The New Company will sell a further 45,000 shares of such stock for cash to provide additional capital.

Prior to the consummation of the Plan, the preferred stocks of the Raybestos Company and the United States Company will be called for redemption.

The Committee constituted by the annexed Agreement shall have full discretion as to the method of carrying the Plan into effect and the legal procedure incident thereto and also as to the amount of stock of the Raybestos Company which must be deposited under this Plan and the an-

nexed Agreement in order to make the consummation of the Plan practicable.

[fol. 23] Agreement

Agreement, dated May 22, 1929, by and between Sumner Simpson, Clifford Hemphill and William T. Hincks (hereinafter called the "Committee"), parties of the first part, and such holders of Common Stock of The Raybestos Company, a Connecticut corporation (hereinafter called "the Raybestos Company"), as shall become parties hereto in the manner hereinafter provided and their successors in interest (hereinafter collectively called "the Depositors"), parties of the second part:

In consideration of the consent and undertaking of the Committee to act as such in behalf of the Depositors as hereinafter set forth, and of the mutual agreements herein contained, and for other good and valuable considerations, the parties hereto agree, each Depositor agreeing with each of the other Depositors and with the Committee, as follows:

1. The Depositors hereby constitute and appoint Sumner Simpson, Clifford Hemphill and William T. Hincks a Committee, with all of the powers, rights and privileges by this Agreement conferred upon the Committee.

2. The accompanying Plan is and shall be taken to be a part of this Agreement, with the same effect as though each and every provision thereof had been embodied herein, and said Plan and this Agreement shall be read as parts of one and the same instrument.

3. Holders of Common Stock of the Raybestos Company may become parties hereto by depositing the certificates representing such stock hereunder with the Depositary hereinafter in paragraph 4 designated or with any subdepositary appointed as hereinafter provided, on or before the close of business on June 17, 1929, or such later date as the Committee from time to time may fix as hereinafter [fol. 24] provided. Each stock certificate so deposited must be duly endorsed in blank for transfer or accompanied by a duly executed stock power in form approved by the Committee and must be accompanied by such evidence as the Committee may in any case require of the genuineness and sufficiency of such endorsement or stock power. Except

where it is requested that a Certificate of Deposit be issued in the name of someone other than the record holder of the stock deposited transfer tax stamps need not be attached, the cost of any such stamps which may be required to be affixed being part of the expenses of the Committee under the Plan and this Agreement. Every stockholder who shall so deposit his stock certificate or certificates shall be held to have assented to, and shall be bound by the provisions of, the Plan and this Agreement in the same manner and with the same effect as if he had executed the same.

The Committee shall have full power in its discretion from time to time, in general or in particular instances, and upon such general or special terms and conditions as it may see fit, to extend the time for the making of deposits under the Plan and this Agreement, and to accept the deposit of any of such stock under the Plan and this Agreement after the period at any time limited for such deposit shall have elapsed.

4. Upon depositing his stock as aforesaid, each Depositor will receive a Certificate or Certificates of Deposit in the name of the Depositor, specifying the number of shares deposited and reciting that such stock has been deposited hereunder, and otherwise in such form as shall be prescribed by the Committee, signed by the Depositary hereinafter designated or a sub-depositary appointed as herein-[fol. 25] after provided, and registered by the appropriate Registrar.

The Committee hereby appoints Guaranty Trust Company of New York, New York City, N. Y., Depositary of the Committee and hereby appoints The Commercial National Bank and Trust Company of New York, New York City, N. Y., Registrar to register Certificates of Deposit signed by the Depositary.

The Depositary shall keep at its office books (which shall be deemed books of the Committee) and shall record in such books the names and addresses (as furnished) of all persons to whom Certificates of Deposit are issued by the Depositary and shall likewise record in such books all transfers of Certificates of Deposit made by the Depositary.

The interests represented by the Certificates of Deposit issued hereunder shall be transferable, subject to the terms and conditions of the Plan and this Agreement, on the books of the Committee by the holders thereof in person or by

duly authorized attorney upon surrender of such Certificates of Deposit, properly endorsed, accompanied with any transfer tax stamps required by law. Thereupon a new Certificate or Certificates of Deposit, registered in the name of the transferee, shall be issued. Each transferee of any Certificate of Deposit shall be deemed to be a Depositor and shall be a party to this Agreement, and, as such, entitled to the same rights and privileges, and in every way as fully bound by and subject to the Plan and this Agreement, as the original Depositor.

Title to the Certificates of Deposit, when duly endorsed, shall be transferable, to the extent permitted by law, with the same effect as in the case of negotiable instruments. [fol. 26] Each holder of a Certificate of Deposit by acceptance thereof shall be deemed to consent and agree that delivery by any bearer thereof of such Certificate of Deposit, duly endorsed in blank, shall vest the title thereto and all rights and interests represented thereby in the transferee to the same extent, for all purposes, as would delivery under like circumstances of a negotiable instrument payable to bearer; provided, however, that the Depositary, any sub-depositary, any agent for the Depositary and the Committee may treat the record holder of any Certificate of Deposit (or, when presented duly endorsed in blank, the bearer thereof) as the absolute owner thereof for all purposes, and shall not be affected by any notice to the contrary.

The Committee may make provision for the replacement of any Certificates of Deposit which shall be lost, stolen or destroyed or which shall become mutilated.

5. The Committee is hereby authorized and empowered to construe the Plan and this Agreement, and the Committee's construction of the same, made in good faith, shall be final, conclusive and binding. The Committee may supply any defect or omission in the Plan and this Agreement and reconcile any inconsistency therein.

6. Each and every Depositor hereby authorizes and requests the Committee, as the Depositor's agent and attorney-in-fact, to endeavor to carry the Plan into practical operation, in such form and in such manner and by such steps as the Committee in its uncontrolled discretion shall deem best, and for this purpose the Committee is empowered hereby to exercise all the rights of the Depositors with

respect to the deposited stock. The methods to be adopted in carrying out the Plan and this Agreement shall be en- [fol. 27] tirely discretionary with the Committee and the Plan and this Agreement are in all respects to be liberally construed so as to enable the Committee to carry into effect the purposes of the Plan.

The deposit of shares of stock in accordance with the provisions of the Plan and this Agreement shall not constitute an assignment thereof, but the title to the deposited stock shall remain in the Depositors thereof unless and until the Committee shall elect to take title thereto and file with the Depositary a certified copy of its resolution so electing, whereupon title thereto shall vest in the Committee as joint tenants and not as tenants in common, and in the survivor or survivors of the Committee and their successors, or, at the option of the Committee, expressed in such resolution, in its nominee or nominees. The Depositors severally agree that, at any time when the Committee shall have elected to take title to the deposited stock, they will execute and deliver any and all further transfers and assignments or other writings requested by the Committee in order more effectively to vest the ownership of the deposited stock in the Committee, its nominee or nominees. Unless and until the Committee shall so elect to take title thereto and file with the Depositary a certified copy of its resolution so electing, any and all directions to the Depositary respecting any such shares of stock, and any and all disposition by the Committee of any such shares of stock, and any and all action of the Committee with respect to any such shares of stock, shall be as the irrevocable agent and attorney-in-fact of the Depositors.

7. The Committee may take any and all steps and proceedings, and do any and all acts and things, and execute and deliver any and all documents, which it shall deem [fol. 28] necessary, expedient or desirable for the purpose of carrying out the Plan and this Agreement, or for the purpose of asserting, protecting or enforcing the rights or interests of the Depositors, or for any other purpose thereof. Without prejudice to the general powers herein granted, the Committee, for the purpose of carrying out the Plan and this Agreement, may procure the organization of one or more new corporations under such name or

names as it shall determine or may adopt or use any existing or future corporations with such change of name, if any, as it shall determine, and, with respect to the Raybestos Company or its assets and business, may make or cause to be made such consolidations, mergers, purchases, sales or other arrangements, and may cause to be made such charter amendments and changes in capital structure, and may take such other steps, as the Committee may deem advisable; and may form or procure the formation of any syndicate or syndicates, of which the Committee, or any member or members thereof, acting alone or in association with others, may be the manager or managers. The Committee, in its discretion, may leave undisturbed the rights of stockholders of the Raybestos Company who do not deposit their stock under the Plan and this Agreement, or may make or approve such provision for such stockholders as the Committee may deem expedient.

Without prejudice as aforesaid, the Depositors hereby severally irrevocably authorize and empower the Committee (as the holder of the deposited stock, provided the Committee shall have taken title thereto as hereinabove permitted, or otherwise as the attorney and/or proxy of the Depositors) to call or waive notice of, and to attend in person or by proxy or substitute proxy or by proxy ap- [fol. 29] pointed by the Committee as the agent and attorney-in-fact of the Depositors, any and all meetings of stockholders of the Raybestos Company and to vote or cause to be voted, or to consent with respect to, any or all of the deposited stock in any manner and for any purpose deemed by the Committee to be advisable for the carrying out of the Plan and this Agreement, expressly including among such purposes the amendment of the charter of the Raybestos Company in any manner which the Committee, being advised by counsel, shall deem advisable to facilitate the consummation of the Plan, and any transfer or conveyance of assets contemplated thereby; and the Depositors hereby severally irrevocably authorize and empower the Committee, with respect to any stock of the New Company received by the Committee (until the same have been distributed, as contemplated by the Plan, to the Depositors entitled ultimately to receive the same), to deal with such stock as the irrevocable agent and attorney-in-fact of the Depositors, and to call or waive notice of and to attend in person or by proxy or substitute proxy or by proxy appointed by the

Committee as the agent and attorney-in-fact of the Depositors, any and all meetings of stockholders of the New Company and to vote or cause to be voted, or to consent with respect to, any or all of such stock in any manner and for any purpose deemed by the Committee to be advisable for the carrying out of the Plan. The Committee is authorized and empowered as attorney-in-fact of each and every of the Depositors to execute, for and in the name of the Depositors or in the name of the Committee, any and all proxies, waivers, consents or other documents deemed by the Committee desirable to facilitate the consummation of the Plan.

[fol. 30] No expense incurred by, or compensation of, the Committee or any other expenses shall be charged against the Depositors or against any of the deposited stock, the Raybestos Company having agreed to pay the same.

8. The Depositors hereby severally irrevocably authorize and empower the Committee to receive, and irrevocably authorize and direct the Raybestos Company and the New Company to pay to or on the order of the Committee all dividends paid on the deposited stock so long as it shall remain on deposit hereunder or on stock of the New Company received by the Committee (until the same shall have been distributed, as contemplated by the Plan, to the Depositors entitled ultimately to receive the same). When and as any dividends shall be receivable by the Committee on deposited stock or on such stock of the New Company, the Committee will direct the Raybestos Company or the New Company, as the case may be, to pay the same to the persons who on the books of the Committee to be kept by the Depositary shall be the record holders of Certificates of Deposit representing such stock at the close of business on the date as of which the Raybestos Company or the New Company determines its recorded stockholders entitled to receive such dividend; such payments to be made to the holders of such Certificates of Deposit ratably according to the number of deposited shares represented by such Certificates respectively.

9. Upon compliance with all the terms and conditions of the Plan and this Agreement, Depositors will be entitled to receive, upon the consummation of the Plan, and upon surrender of their Certificates of Deposit, the stock, and script for fractions of shares of stock, of the New Com-

pany (but only as and when issued and ready for delivery) [fol. 31] to which they shall be entitled pursuant to the terms and provisions of the Plan and this Agreement.

The Committee, subject to the provisions of this Agreement, is authorized and empowered to prescribe terms and conditions as to the surrender of Certificates of Deposit with which holders of Certificates of Deposit must comply in order to receive the stock, and scrip for fractions of shares of stock, of the New Company receivable by the Depositors under the Plan, and for the purpose of facilitating the delivery thereof, the Committee may order the books of the Committee for the transfer of Certificates of Deposit to be permanently closed against the making of transfers upon a date not less than ten days after mailing notice of such closing of the books to the Depositors in accordance with the provisions of Section 13 hereof.

The Depositors hereby severally irrevocably authorize and empower the Committee, upon and after any transfer of the business and assets of the Raybestos Company to the New Company in accordance with the Plan, to take such action or initiate or participate in such proceedings by way of disposing of, extinguishing or otherwise dealing with the deposited stock of the Raybestos Company as the Committee in its discretion shall determine.

10. The Committee may abandon the Plan at any time if in its discretion the Committee shall deem it impracticable to carry the same into execution. Such abandonment shall be effected by resolution of the Committee, and notice thereof shall be lodged with the Depositary, and mailed to the Depositors in accordance with the provisions of Section 13 hereof. Thereafter any Depositor may withdraw the stock of the Raybestos Company represented by [fol. 32] his Certificate of Deposit. In the absence of such notice of abandonment no Depositor may withdraw stock of the Raybestos Company represented by his Certificate of Deposit or withdraw from this Agreement prior to June 1, 1930. If the Plan shall not have been carried into execution by that date, any Depositor may thereafter withdraw the stock of the Raybestos Company represented by his Certificate of Deposit.

The Committee, subject to the provisions of this Agreement, is authorized and empowered to make reasonable regulations as to the procedure to be followed by holders of

Certificates of Deposit in withdrawing, in either of the events aforesaid, the stock of the Raybestos Company represented by their Certificates of Deposit, and for the purpose of facilitating delivery of such stock the Committee may order the books for the transfer of Certificates of Deposit to be permanently closed against the making of transfers upon a date not less than ten days after mailing notice of such closing of the books to the Depositors in accordance with the provisions of Section 13 hereof.

11. Every holder of a Certificate of Deposit, by the surrender thereof to the Committee and the receipt of certificates representing the deposited stock, or the stock, and scrip for fractions of shares of stock, of the New Company, deliverable to him hereunder, shall be deemed to have released and discharged the Committee, the Depositary and all other persons from all liability and accountability of any and every kind hereunder.

After the books for the transfer of Certificates of Deposit shall have been closed against the making of transfers (whether upon the consummation of the Plan or upon its [fol. 33] abandonment) the Committee, whenever there shall be lodged with the Depositary

(a) in case the Plan shall have been consummated, the stock, and scrip for fractions of shares of stock, of the New Company which Depositors holding outstanding Certificates of Deposit shall be entitled to receive under the Plan and this Agreement, or

(b) in case the Plan shall have been abandoned, the stock of the Raybestos Company represented by the outstanding Certificates of Deposit,

may instruct the Depositary to hold the stock, and scrip for fractions of shares of stock, of the New Company, or the stock of the Raybestos Company, as the case may be, so lodged with it for the holders of outstanding Certificates of Deposit and to distribute the same to such holders upon surrender to it of their Certificates of Deposit; and, such stock having been so lodged and such instructions so given, the Committee shall be under no responsibility to the Depositors, and the rights of the Depositors shall be limited to receiving from the Depositary the stock, and scrip for fractions of shares of stock, of the New Company, or the

stock of the Raybestos Company, as the case may be, so held by the Depositary.

12. Neither the Committee nor the Depositary nor any sub-depositary nor any agent for the Depositary is to be under any obligation, legal or equitable, express or implied, to any holder of stock of the Raybestos Company who shall not deposit the same hereunder, or to any person whomsoever, other than the holders of Certificates of Deposit issued in accordance with the terms hereof. With respect to the holders of such Certificates of Deposit, the Committee undertakes to endeavor in good faith to [fol. 34] carry out the Plan and this Agreement, but neither the Committee nor any member thereof nor the Depositary nor any sub-depositary nor any agent for the Depositary assumes any responsibility for the carrying out of the Plan and this Agreement or for the result of any steps taken or acts done for the purpose thereof. Neither the Committee nor any member thereof nor the Depositary nor any sub-depositary nor any agent for the Depositary shall be liable for any act or omission of any attorney, agent or employee, or for anything except for his or its own willful misconduct. Neither the Depositary nor any sub-depositary, by the delivery of any Certificate of Deposit hereunder, makes any representation or warranty of any sort whatsoever other than that it agrees to use its best judgment and good faith in the performance of its duties hereunder, and by the acceptance of any such Certificate of Deposit every holder expressly relieves the Depositary and each and every sub-depositary of any liability except as aforesaid. Neither the Committee nor any member thereof nor the Depositary nor any sub-depositary nor any agent for the Depositary assumes any responsibility or liability as to the genuineness, validity or regularity of any of the stock, or scrip for fractions of shares of stock, of the New Company created or issued in connection herewith, or as to the validity or sufficiency of any corporate proceedings or acts of the Raybestos Company, the Manhattan Company, the United States Company or the New Company.

Any member of the Committee or any corporation, association or partnership of which any member of the Committee may be an officer, director, member or partner, or the Depositary or any sub-depositary or agent for the De- [fol. 35] positary or any officer or director of any of them,

may be or become pecuniarily interested in any stock, Certificates of Deposit, subscription rights, contracts, property or matters which the Plan or this Agreement concerns, and may participate in any underwriting syndicate as syndicate manager, syndicate subscriber, or otherwise, and may be an officer or director of the Raybestos Company or of the Manhattan Company or of the United States Company or of the New Company. The Depositary or any subdepositary or agent for the Depositary may be trustee under any agreement created or entered into in connection with the Plan, or otherwise act in any manner for the Raybestos Company or for the Manhattan Company or for the United States Company or for the New Company or for the holders of any of the stock of any of such corporations.

13. Any notice or other communication required or permitted by the provisions hereof to be sent to any Depositor shall be conclusively deemed to have been duly communicated if and when deposited in the United States mail, postpaid, addressed to such Depositor at his address appearing upon the books of the Committee kept by the Depositary.

An affidavit made before a notary public by the Secretary of the Committee, or by an officer or employee of the Depositary, with respect to the mailing of notices herein provided for shall be conclusive evidence of the giving of such notices.

14. The Committee, as from time to time constituted and notwithstanding any vacancy, shall have all the powers, rights and interests of the Committee as named in this Agreement. The Committee may elect a Chairman, and may appoint a Secretary (who may, but need not, be a mem- [fol. 36] ber of the Committee) who shall keep a record of its acts and proceedings. From time to time the Committee may choose such other officers and designate or cause to be designated such committees or sub-committees (whose members may, but need not, be members of the Committee) as it may see fit, and may confer upon any of its officers, committees or sub-committees such powers as it may deem advisable. The Committee from time to time may add to its number by electing, by a majority vote of its then members, an additional member or members, and the member or members so elected shall have all the powers, rights and interests of the members of the Committee under the Plan and this Agreement and, together with those herein named or

their successors, shall constitute the Committee under the Plan and this Agreement with like force and effect as though they were specifically named herein. Any member of the Committee may resign by filing written notice of his resignation with the Chairman or Secretary of the Committee. In case at any time a vacancy shall occur in the Committee by death or resignation, or from any other cause, such vacancy may, but need not, be filled by a majority of the then members of the Committee. Notices of changes in the membership of the Committee filed with the Depositary shall bind all parties hereto.

A majority of the members of the Committee shall constitute a quorum for all purposes, and all the powers of the Committee may be exercised by a majority of its then members either at a meeting, or in writing or by telegraph, wireless or cable without a meeting. A member of the Committee by written proxy may authorize any person (who may, but need not, be another member of the Committee) [fol. 37] to act in his place for any and all purposes. The certificate of the Chairman or Secretary as to any action by the Committee shall be conclusive upon and full protection to the Depositary and all sub-depositaries and agents for the Depositary and all other persons, and conclusive upon all Depositors, as to all acts and things so certified to have been done by the Committee. The Committee from time to time may make, alter and rescind such rules and regulations for the transaction of its business as it may deem advisable.

The Committee may appoint such sub-depositaries and registrars and may employ such counsel, agents and employees as in its opinion shall be necessary or useful, and may delegate any power or authority as well as discretion. If the Committee shall appoint any sub-depositaries, it may make such regulations with respect to their duties and functions as to it shall seem advisable, and may provide that any Certificate of Deposit issued by any sub-depositary shall be transferable at the office of the Depositary as well as at the office of the sub-depositary issuing the same.

15. The deposited stock and any stock of the New Company received by the Committee shall be held by the Depositary and any sub-depositary or agent for the Depositary subject to the orders of the Committee, and neither the Depositary nor any sub-depositary or agent for the Deposi-

tary shall incur any liability for anything done or permitted to be done at the request or direction of the Committee. The Depositary and any sub-depositary or agent for the Depositary shall be bound to exercise only reasonable care in the safekeeping of the deposited stock and of any other securities or cash which may be deposited with or held by them hereunder respectively, and to deal there-
[fol. 38] with in accordance with the directions of the Committee.

The Depositary or any sub-depositary may resign upon thirty days' notice in writing to the Committee, and the Committee shall have power to remove the Depositary or any sub-depositary and from time to time in its discretion to fill any vacancy however arising in the office of the Depositary or any sub-depositary. In the event of the resignation or removal of the Depositary or any sub-depositary, it shall deliver all cash, securities, property and records held by it hereunder as directed by the Committee.

16. The enumeration of specific powers herein conferred upon the Committee shall not be construed to limit or to restrict general powers herein conferred or intended so to be, and it is hereby declared that it is intended to confer upon the Committee in respect of all deposited stock and in all other respects any and all powers which the Committee may deem expedient for carrying out or promoting the purposes of the Plan and this Agreement in any respect, even though any such power be apparently of a character not now contemplated; and the Committee may exercise any and every such power as fully and effectively as if the same were herein distinctly specified and as often as for any reason it may deem expedient.

17. No statement contained in the Plan or in this Agreement, or in any document, circular letter, notice or communication at any time issued or published by the Committee, by the Depositary, by any sub-depositary or agent for the Depositary, by the Raybestos Company, by the Manhattan Company, by the United States Company, by the New Company or by any officer or attorney of any of said
[fol. 39] corporations or by any other person, is intended to be, or is to be accepted as, a representation or warranty or a condition of the Plan or this Agreement; and no error, defect or irregularity herein or therein, or in any such docu-

ment, circular letter, notice or communication, shall release any Depositor, or affect or release any deposit hereunder, except by written consent of the Committee.

18. The Plan and this Agreement shall bind and benefit the several parties hereto, and each and all the survivors, heirs, executors, administrators and assigns of said parties, and of each of them. The rights of the Depositors shall be such only as are conferred by the Plan and this Agreement and shall be subject to compliance by the Depositors with the terms and conditions set forth therein and herein.

19. This Agreement may be executed in several counterparts and all such counterparts shall be taken together as forming one agreement. Upon the execution of this Agreement by the members of the Committee or a majority of them, an executed counterpart shall be deposited with the Depositary.

In witness whereof, the members of the Committee have executed this Agreement and the Depositors have become parties hereto by depositing their certificates of stock hereunder, as above set forth, all as of the date first above recited.

Sumner Simpson, Clifford Hemphill, William T. Hincks, Committee.

[fol. 40] EXHIBIT "C" TO PETITION

United States Asbestos Company

Office of the President

To holders of common stock of the United States Asbestos Company:

Representatives of your Company and of The Raybestos Company, a Connecticut corporation, and The Manhattan Rubber Manufacturing Company, a New Jersey corporation, have developed a plan for combining the businesses of such companies. Such plan, it is believed, will prove of great advantage to the business and stockholders of all three companies. Under this plan, described in the accompanying "Plan and Agreement" to which you are

referred, it is contemplated that a corporation (hereinafter called "the New Company") will acquire, directly or indirectly, by purchase, merger, consolidation or otherwise, all of the assets of the three companies, and will assume all of their obligations and liabilities.

The New Company is to have an authorized capital consisting of 1,000,000 shares without par value, of which it is planned to issue 631,012 shares in replacement of the shares of stock of United States Asbestos Company, The Raybestos Company, and The Manhattan Rubber Manufacturing Company. Prior to the consummation of the Plan the outstanding issues of Preferred Stock of The Raybestos Company and the United States Asbestos Company will be called for redemption. The holders of Common Stock of the three companies will receive Common [fol. 41] Stock of the New Company in replacement of their present stock on the following basis:

	Shares of Common Stock now outstanding	Shares of Common Stock of New Company
1-14/100 shares of stock of the New Company for each share of Common Stock of United States Asbestos Company.	100,000 (no par value) (United States Asbestos Company).	114,000
2-25/100 shares of stock of the New Company for each share of Common Stock of The Raybestos Company.	118,672 ($25. par value) (The Raybestos Company)	267,012
1-25/100 shares of stock of the New Company for each share of stock of The Manhattan Rubber Manufacturing Company.	200,000 ($25. par value) (The Manhattan Rubber Manufacturing Company).	250,000

An additional 45,000 shares of Common Stock of the New Company is also to be sold for cash to replace funds required for the retirement of Preferred Stock of existing companies and for the general purposes of the New Company.

Upon the consummation of the Plan the New Company will have no funded debt and no preferred stock and will have ample working capital. Combined earnings of the three companies for 1928 available for dividends, as shown by their audited statements, amounted to $2,465,586, equivalent to $3.65 per share for the year 1928 on the stock of

the New Company which will be outstanding upon the consummation of the Plan. Combined earnings for the first quarter of 1929, as reported by the three companies, amounted to $888,417, equivalent to $1.31 per share for such quarter on such stock. It is expected that the New Company will inaugurate a dividend policy resulting in a return to each stockholder on his holdings in the New Company not less than the dividend return on his holdings of [fol. 42] common stock in the present company.

It is believed that combining the business of the three companies will bring about substantial economies both in manufacturing and selling expenses. The combined business will also make a better rounded and more complete industrial unit. With a view of furnishing the stockholders a wider market for their holdings, application will be made to list the stock of the New Company on the New York Stock Exchange.

Messrs. Zimmerman, Weber and Atkins of your Board of Diretcors will serve as a Committee to receive deposits of stock under the Plan and have caused to be prepared the Plan and Agreement under which such deposit may be made. Depositors will not be called upon to pay any compensation or expenses of the Committee or any other expenses.

Holders of more than a majority of the Common Stock of your Company and holders of more than a majority of the common stock of each of the other two companies have already approved the Plan and have agreed to deposit their stock. Prompt cooperation by all stockholders in the deposit of their stock will greatly facilitate the consummation of the Plan, and is necessary to assure participation in the Plan.

As provided in the Agreement the registered holders of Certificates of Deposit will receive dividends paid on the deposited stock pending the consummation of the Plan. Upon deposit of the stock the Depositary will issue Certificates of Deposit which will be transferable in the same way as the stock certificates. Application will be made to admit such Certificates of Deposit to trading on the New York Curb Market.

[fols. 43 & 44] Deposited stock certificates must be duly endorsed in blank for transfer or accompanied by duly executed stock powers and signatures must be guaranteed

by a New York City Bank or Trust Company or a bank or trust company having a New York City correspondent or by a New York Stock Exchange firm. Transfer tax stamps need not be attached, except where it is requested that a Certificate of Deposit be issued in the name of someone other than the holder of record of the deposited stock. Stockholders should forward their stock certificates with the enclosed letter of transmittal immediately to Chemical Bank & Trust Company, 165 Broadway, New York City, Depositary. For the convenience of stockholders arrangements have been made whereby The Lancaster Trust Company, Lancaster, Pennsylvania, will forward to the Depositary any stock delivered to it for that purpose.

Deposit of stock will constitute assent to the Plan and Agreement. If the Plan should fail of consummation because of insufficient deposited stock or otherwise, the deposited stock will be returned to the depositors without charge.

The Committee has fixed June 17, 1929, as the last day for making deposits under the Plan.

The Board of Directors of your company by a resolution unanimously adopted have recommended that the Common Stockholders of the company deposit their stock under the Plan. On behalf of the Board of Directors and as President of your company I recommend that you promptly deposit your stock.

S. R. Zimmerman, President.

May 22, 1929.

Note: Requests for further information should be addressed to the Secretary of the Committee, Robert W. Atkins, 25 Broad Street, New York City.

[fols. 45 & 46] United States Asbestos Company. Common Stock. Plan and Agreement Dated May 22, 1929. S. R. Zimmerman, George R. Weber, Robert W. Atkins, Committee. Robert W. Atkins, Secretary, 25 Broad Street, New York City. Depositary, Chemical Bank & Trust Company, New York City, N. Y.

[fol. 47] Plan

It is proposed that all of the business and assets of United States Asbestos Company, a Pennsylvania corpora-

tion (herein and in the annexed Agreement called "the United States Company"), The Raybestos Company, a Connecticut corporation (herein and in the annexed Agreement called "the Raybestos Company"), and The Manhattan Rubber Manufacturing Company, a New Jersey corporation (herein and in the annexed Agreement called "the Manhattan Company"), shall be acquired directly or indirectly, by purchase, merger, consolidation, or otherwise, by a corporation (herein and in the annexed Agreement called "the New Company"), the New Company to assume all of the liabilities and obligations of the United States Company, the Raybestos Company, and the Manhattan Company.

The New Company shall have an authorized capital of 1,000,000 shares of common stock, without par value, and may be a new corporation organized under the laws of any state selected by the Committee constituted by the Agreement annexed hereto or, at the election of such Committee, the New Company may be any one of the above-named companies with appropriate change of its present capital structure and charter.

The stock holders of the above-named companies are to receive stock of the New Company on the following basis:

1-14/100 shares of common stock of the New Company for each share of common stock of the United States Company.

[fol. 48] 2¼ shares of common stock of the New Company for each share of common stock of the Raybestos Company.

1¼ shares of common stock of the New Company for each share of stock of the Manhattan Company.

In lieu of any fraction of a share of common stock of the New Company deliverable to any stockholder of any of the above-named companies, there will be issued non-voting and non-dividend bearing common stock scrip, exchangeable, in amounts calling for one or more full shares, for a certificate of such share or shares.

On the above basis, there will be required for distribution to the common stockholders of the United States Company, the Raybestos Company, and the Manhattan Company an aggregate of 631,012 shares of common stock of the New Company. The New Company will sell a further

45,000 shares of such stock for cash to provide additional capital.

Prior to the consummation of the Plan, the preferred stocks of the United States Company and the Raybestos Company will be called for redemption.

The Committee constituted by the annexed Agreement shall have full discretion as to the method of carrying the Plan into effect and the legal procedure incident thereto and also as to the amount of stock of the United States Company which must be deposited under this Plan and the annexed Agreement in order to make the consummation of the Plan practicable.

[fol. 49] Agreement

Agreement, dated May 22, 1929, by and between S. R. Zimmerman, George R. Weber and Robert W. Atkins (hereinafter called the "Committee"), parties of the first part, and such holders of Common Stock of United States Asbestos Company, a Pennsylvania corporation (hereinafter called "the United States Company"), as shall become parties hereto in the manner hereinafter provided and their successors in interest (hereinafter collectively called "the Depositors"), parties of the second part:

In consideration of the consent and undertaking of the Committee to act as such in behalf of the Depositors as hereinafter set forth, and of the mutual agreements herein contained, and for other good and valuable considerations, the parties hereto agree, each Depositor agreeing with each of the other Depositors and with the Committee, as follows:

1. The Depositors hereby constitute and apppoint S. R. Zimmerman, George R. Weber and Robert W. Atkins a Committee, with all of the powers, rights and privileges by this Agreement conferred upon the Committee.

2. The accompanying Plan is and shall be taken to be a part of this Agreement, with the same effect as though each and every provision thereof had been embodied herein, and said Plan and this Agreement shall be read as parts of one and the same instrument.

3. Holders of Common Stock of the United States Company may become parties hereto by depositing the certificates representing such stock hereunder with the Deposi-

tary hereinafter in paragraph 4 designated or with any sub-depositary appointed as hereinafter provided, on or before the close of business on June 17, 1929, or such later [fol. 50] date as the Committee from time to time may fix as hereinafter provided. Each stock certificate so deposited must be duly endorsed in blank for transfer or accompanied by a duly executed stock power in form approved by the Committee and must be accompanied by such evidence as the Committee may in any case require of the genuineness and sufficiency of such endorsement or stock power. Except where it is requested that a Certificate of Deposit be issued in the name of someone other than the record holder of the stock deposited transfer tax stamps need not be attached, the cost of any such stamps which may be required to be affixed being part of the expenses of the Committee under the Plan and this Agreement. Every stockholder who shall so deposit his stock certificate or certificates shall be held to have assented to, and shall be bound by the provisions of, the Plan and this Agreement in the same manner and with the same effect as if he had executed the same.

The Committee shall have full power in its discretion from time to time, in general or in particular instances, and upon such general or special terms and conditions as it may see fit, to extend the time for the making of deposits under the Plan and this Agreement, and to accept the deposit of any of such stock under the Plan and this Agreement after the period at any time limited for such deposit shall have elapsed.

4. Upon depositing his stock as aforesaid, each Depositor will receive a Certificate or Certificates of Deposit in the name of the Depositor, specifying the number of shares deposited and reciting that such stock has been deposited hereunder, and otherwise in such form as shall be prescribed by the Committee, signed by the Depositary hereinafter designated or a sub-depositary appointed as herein- [fol. 51] after provided, and registered by the appropriate Registrar.

The Committee hereby appoints Chemical Bank & Trust Company, New York City, N. Y., Depositary of the Committee and hereby appoints The Equitable Trust Company of New York, New York City, N. Y., Registrar to register Certificates of Deposit signed by the Depositary.

The Depositary shall keep at its office books (which shall be deemed books of the Committee) and shall record in such books the names and addresses (as furnished) of all persons to whom Certificates of Deposit are issued by the Depositary and shall likewise record in such books all transfers of Certificates of Deposit made by the Depositary.

The interests represented by the Certificates of Deposit issued hereunder shall be transferable, subject to the terms and conditions of the Plan and this Agreement, on the books of the Committee by the holders thereof in person or by duly authorized attorney upon surrender of such Certificates of Deposit, properly endorsed, accompanied with any transfer tax stamps required by law. Thereupon a new Certificate or Certificates of Deposit, registered in the name of the transferee, shall be issued. Each transferee of any Certificate of Deposit shall be deemed to be a Depositor and shall be a party to this Agreement, and, as such, entitled to the same rights and privileges, and in every way as fully bound by and subject to the Plan and this Agreement, as the original Depositor.

Title to the Certificates of Deposit, when duly endorsed, shall be transferable, to the extent permitted by law, with the same effect as in the case of negotiable instruments. [fol. 52] Each holder of a Certificate of Deposit by acceptance thereof shall be deemed to consent and agree that delivery by any bearer thereof of such Certificate of Deposit, duly endorsed in blank, shall vest the title thereto and all rights and interests represented thereby in the transferee to the same extent, for all purposes, as would delivery under like circumstances of a negotiable instrument payable to bearer; provided, however, that the Depositary and any sub-depositary and any agent for the Depositary and the Committee may treat the record holder of any Certificate of Deposit (or, when presented duly endorsed in blank, the bearer thereof) as the absolute owner thereof for all purposes, and shall not be affected by any notice to the contrary.

The Committee may make provision for the replacement of any Certificates of Deposit which shall be lost, stolen or destroyed or which shall become mutilated.

5. The Committee is hereby authorized and empowered to construe the Plan and this Agreement, and the Com-

mittee's construction of the same, made in good faith, shall be final, conclusive and binding. The Committee may supply any defect or omission in the Plan and this Agreement and reconcile any inconsistency therein.

6. Each and every Depositor hereby authorizes and requests the Committee, as the Depositor's agent and attorney-in-fact, to endeavor to carry the Plan into practical operation, in such form and in such manner and by such steps as the Committee in its uncontrolled discretion shall deem best, and for this purpose the Committee is empowered hereby to exercise all the rights of the Depositors with respect to the deposited stock. The methods to be adopted in carrying out the Plan and this Agreement shall be en- [fol. 53] tirely discretionary with the Committee and the Plan and this Agreement are in all respects to be liberally construed so as to enable the Committee to carry into effect the purposes of the Plan.

The deposit of shares of stock in accordance with the provisions of the Plan and this Agreement shall not constitute an assignment thereof, but the title to the deposited stock shall remain in the Depositors thereof unless and until the Committee shall elect to take title thereto and file with the Depositary a certified copy of its resolution so electing, whereupon title thereto shall vest in the Committee as joint tenants and not as tenants in common, and in the survivor or survivors of the Committee and their successors, or, at the option of the Committee, expressed in such resolution, in its nominee or nominees. The Depositors severally agree that, at any time when the Committee shall have elected to take title to the deposited stock, they will execute and deliver any and all further transfers and assignments or other writings requested by the Committee in order more effectively to vest the ownership of the deposited stock in the Committee, its nominee or nominees. Unless and until the Committee shall so elect to take title thereto and file with the Depositary a certified copy of its resolution so electing, any and all directions to the Depositary respecting any such shares of stock, and any and all disposition by the Committee of any such shares of stock, and any and all action of the Committee with respect to any such shares of stock, shall be as the irrevocable agent and attorney-in-fact of the Depositors.

7. The Committee may take any and all steps and proceedings, and do any and all acts and things, and execute and deliver any and all documents, which it shall deem [fol. 54] necessary, expedient or desirable for the purpose of carrying out the Plan and this Agreement, or for the purpose of asserting, protecting or enforcing the rights or interests of the Depositors, or for any other purpose thereof. Without prejudice to the general powers herein granted, the Committee, for the purpose of carrying out the Plan and this Agreement, may procure the organization of one or more new corporations under such name as it shall determine or may adopt or use any existing or future corporations with such change of name, if any, as it shall determine, and, with respect to the United States Company or its assets and business, may make or cause to be made such consolidations, mergers, purchases, sales or other arrangements, and may cause to be made such charter amendments and changes in capital structure, and may take such other steps, as the Committee may deem advisable; and may form or procure the formation of any syndicate or syndicates, of which the Committee, or any member or members thereof, acting alone or in association with others, may be the manager or managers. The Committee, in its discretion, may leave undisturbed the rights of stockholders of the United States Company who do not deposit their stock under the Plan and this Agreement, or may make or approve such provision for such stockholders as the Committee may deem expedient.

Without prejudice as aforesaid, the Depositors hereby severally irrevocably authorize and empower the Committee (as the holder of the deposited stock, provided the Committee shall have taken title thereto as hereinabove permitted, or otherwise as the attorney and/or proxy of the Depositors) to call or waive notice of, and to attend in person or by proxy or substitute proxy or by proxy appointed [fol. 55] by the Committee as the agent and attorney-in-fact of the Depositors, any and all meetings of stockholders of the United States Company and to vote or cause to be voted, or to consent with respect to, any or all of the deposited stock in any manner and for any purpose deemed by the Committee to be advisable for the carrying out of the Plan and this Agreement, expressly including among such purposes the amendment of the charter of the United

States Company in any manner which the Committee, being advised by counsel, shall deem advisable to facilitate the consummation of the Plan, and any transfer or conveyance of assets contemplated thereby; and the Depositors hereby severally irrevocably authorize and empower the Committee, with respect to any stock of the New Company received by the Committee (until the same shall have been distributed, as contemplated by the Plan, to the Depositors entitled ultimately to receive the same), to deal with such stock as the irrevocable agent and attorney-in-fact of the Depositors, and to call or waive notice of and to attend in person or by proxy or substitute proxy or by proxy appointed by the Committee as the agent and attorney-in-fact of the Depositors, any and all meetings of stockholders of the New Company and to vote or cause to be voted, or to consent with respect to, any or all of such stock in any manner and for any purpose deemed by the Committee to be advisable for the carrying out of the Plan. The Committee is authorized and empowered as attorney-in-fact of each and every of the Depositors to execute, for and in the name of the Depositors or in the name of the Committee, any and all proxies, waivers, consents or other documents deemed by the Committee desirable to facilitate the consummation of the Plan.

[fol. 56] No expense incurred by, or compensation of, the Committee or any other expenses shall be charged against the Depositors or against any of the deposited stock, the United States Company having agreed to pay the same.

8. The Depositors hereby severally irrevocably authorize and empower the Committee to receive, and irrevocably authorize and direct the United States Company and the New Company to pay to or on the order of the Committee all dividends paid on the deposited stock so long as it shall remain on deposit hereunder or on stock of the New Company received by the Committee (until the same shall have been distributed, as contemplated by the Plan, to the Depositors entitled ultimately to receive the same). When and as any dividends shall be receivable by the Committee on deposited stock or on such stock of the New Company, the Committee will direct the United States Company or the New Company, as the case may be, to pay the same to the persons who on the books of the Committee to be kept by the Depositary shall be the record holders of Certificates

of Deposit representing such stock at the close of business on the date as of which the United States Company or the New Company determines its recorded stockholders entitled to receive such dividend; such payments to be made to the holders of such Certificates of Deposit ratably according to the number of deposited shares represented by such Certificates respectively.

9. Upon compliance with all the terms and conditions of the Plan and this Agreement, Depositors will be entitled to receive, upon the consummation of the Plan, and upon surrender of their Certificates of Deposit, the stock, and scrip for fractions of shares of stock, of the New Company (but only as and when issued and ready for relivery) to which only as and when issued and ready for delivery) to which [fol. 57] they shall be entitled pursuant to the terms and provisions of the Plan and this Agreement.

The Committee, subject to the provisions of this Agreement, is authorized and empowered to prescribe terms and conditions as to the surrender of Certificates of Deposit with which holders of Certificates of Deposit must comply in order to receive the stock, and scrip for fractions of shares of stock, of the New Company receivable by the Depositors under the Plan, and for the purpose of facilitating the delivery thereof, the Committee may order the books of the Committee for the transfer of Certificates of Deposit to be permanently closed against the making of transfers upon a date not less than ten days after mailing notice of such closing of the books to the Depositors in accordance with the provisions of Section 13 hereof.

The Depositors hereby severally irrevocably authorize and empower the Committee, upon and after any transfer of the business and assets of the United States Company to the New Company in accordance with the Plan, to take such action or initiate or participate in such proceedings by way of disposing of, extinguishing or otherwise dealing with the deposited stock of the United States Company as the Committee in its discretion shall determine.

10. The Committee may abandon the Plan at any time if in its discretion the Committee shall deem it impracticable to carry the same into execution. Such abandonment shall be effected by resolution of the Committee, and notice thereof shall be lodged with the Depositary, and mailed to the Depositors in accordance with the provisions

of Section 13 hereof. Thereafter any Depositor may withdraw the stock of the United States Company represented [fol. 58] by his Certificate of Deposit. In the absence of such notice of abandonment no Depositor may withdraw stock of the United States Company represented by his Certificate of Deposit or withdraw from this Agreement prior to June 1, 1930. If the Plan shall not have been carried into execution by that date, any Depositor may thereafter withdraw the stock of the United States Company represented by his Certificate of Deposit.

The Committee, subject to the provisions of this Agreement, is authorized and empowered to make reasonable regulations as to the procedure to be followed by holders of Certificates of Deposit in withdrawing, in either of the events aforesaid, the stock of the United States Company represented by their Certificates of Deposit, and for the purpose of facilitating delivery of such stock the Committee may order the books for the transfer of Certificates of Deposit to be permanently closed against the making of transfers upon a date not less than ten days after mailing notice of such closing of the books to the Depositors in accordance with the provisions of Section 13 hereof.

11. Every holder of a Certificate of Deposit, by the surrender thereof to the Committee and the receipt of certificates representing the deposited stock, or the stock, and scrip for fractions of shares of stock, of the New Company, deliverable to him hereunder, shall be deemed to have released and discharged the Committee, the Depositary and all other persons from all liability and accountability of any and every kind hereunder.

After the books for the transfer of Certificates of Deposit shall have been closed against the making of transfers (whether upon the consummation of the Plan or upon [fol. 59] its abandonment) the Committee, whenever there shall be lodged with the Depositary

(a) in case the Plan shall have been consummated, the stock, and scrip for fractions of shares of stock, of the New Company which Depositors holding outstanding Certificates of Deposit shall be entitled to receive under the Plan and this Agreement, or

(b) in case the Plan shall have been abandoned, the stock of the United States Company represented by the outstanding Certificates of Deposit,

may instruct the Depositary to hold the stock, and scrip for fractions of shares of stock, of the New Company, or the stock of the United States Company, as the case may be, so lodged with it for the holders of outstanding Certificates of Deposit and to distribute the same to such holders upon surrender to it of their Certificates of Deposit; and, such stock having been so lodged and such instructions so given, the Committee shall be under no responsibility to the Depositors, and the rights of the Depositors shall be limited to receiving from the Depositary the stock, and scrip for fractions of shares of stock, of the New Company, or the stock of the United States Company, as the case may be, so held by the Depositary.

12. Neither the Committee nor the Depositary nor any sub-depositary nor any agent for the Depositary is to be under any obligation, legal or equitable, express or implied, to any holder of stock of the United States Company who shall not deposit the same hereunder, or to any person whomsoever, other than the holders of Certificates of Deposit issued in accordance with the terms hereof. With respect to the holders of such Certificates of Deposit, the [fol. 60] Committee undertakes to endeavor in good faith to carry out the Plan and this Agreement, but neither the Committee nor any member thereof nor the Depositary nor any sub-depositary nor any agent for the Depositary assumes any responsibility for the carrying out of the Plan and this Agreement or for the result of any steps taken or acts done for the purpose thereof. Neither the Committee nor any member thereof nor the Depositary nor any sub-depositary nor any agent for the Depositary shall be liable for any act or omission of any attorney, agent or employee, nor for anything except for his or its own willful misconduct. Neither the Depositary nor any sub-depositary, by the delivery of any Certificate of Deposit hereunder, makes any representation or warranty of any sort whatsoever other than that it agrees to use its best judgment and good faith in the performance of its duties hereunder, and by the acceptance of any such Certificate of Deposit every holder expressly relieves the Depositary and each and every sub-depositary of any liability except as aforesaid. Neither the Committee nor any member thereof nor the Depositary nor any sub-depositary nor any agent for the Depositary assumes any responsibility or liability as to the genuineness,

validity or regularity of any of the stock, or scrip for fractions of shares of stock, of the New Company created or issued in connection herewith, or as to the validity or sufficiency of any corporate proceedings or acts of the United States Company, the Raybestos Company, the Manhattan Company, or the New Company.

Any member of the Committee or any corporation, association or partnership of which any member of the Committee may be an officer, director, member or partner, or [fol. 61] the Depositary or any sub-depositary or agent for the Depositary or any officer or director of any of them, may be or become pecuniarily interested in any stock, Certificates of Deposit, subscription rights, contracts, property or matters which the Plan or this Agreement concerns, and may participate in any underwriting syndicate as syndicate manager, syndicate subscriber, or otherwise, and may be an officer or director of the United States Company or of the Raybestos Company or of the Manhattan Company or of the New Company. The Depositary or any sub-depositary or agent for the Depositary may be trustee under any agreement created or entered into in connection with the Plan, or otherwise act in any manner for the United States Company or for the Raybestos Company or for the Manhattan Company or for the New Company or for the holders of any of the stock of any of such corporations.

13. Any notice or other communication required or permitted by the provisions hereof to be sent to any Depositor shall be conclusively deemed to have been duly communicated if and when deposited in the United States mail, postpaid, addressed to such Depositor at his address appearing upon the books of the Committee kept by the Depositary.

An affidavit made before a notary public by the Secretary of the Committee, or by an officer or employee of the Depositary, with respect to the mailing of notices herein provided for shall be conclusive evidence of the giving of such notices.

14. The Committee, as from time to time constituted and notwithstanding any vacancy, shall have all the powers, rights and interests of the Committee as named in this Agreement. The Committee may elect a Chairman, and [fol. 62] may appoint a Secretary (who may, but need not, be a member of the Committee) who shall keep a record of its acts and proceedings. From time to time the Commit-

tee may choose such other officers and designate or cause to be designated such committees or sub-committees (whose members may, but need not, be members of the Committee) as it may see fit, and may confer upon any of its officers, committees or sub-committees such powers as it may deem advisable. The Committee from time to time may add to its number by electing, by a majority vote of its then members, an additional member or members, and the member or members so elected shall have all the powers, rights and interests of the members of the Committee under the Plan and this Agreement and, together with those herein named or their successors, shall constitute the Committee under the Plan and this Agreement with like force and effect as though they were specifically named herein. Any member of the Committee may resign by filing written notice of his resignation with the Chairman or Secretary of the Committee. In case at any time a vacancy shall occur in the Committee by death or resignation, or from any other cause, such vacancy may, but need not, be filled by a majority of the then members of the Committee. Notices of changes in the membership of the Committee filed with the Depositary shall bind all parties hereto.

A majority of the members of the Committee shall constitute a quorum for all purposes, and all the powers of the Committee may be exercised by a majority of its then members either at a meeting, or in writing or by telegraph, wireless or cable without a meeting. A member of the Committee by written proxy may authorize any person (who [fol. 63] may, but need not, be another member of the Committee) to act in his place for any and all purposes. The certificate of the Chairman or Secretary as to any action by the Committee shall be conclusive upon and full protection to the Depositary and all sub-depositaries and agents for the Depositary and all other persons, and conclusive upon all Depositors, as to all acts and things so certified to have been done by the Committee. The Committee from time to time may make, alter and rescind such rules and regulations for the transaction of its business as it may deem advisable.

The Committee may appoint such sub-depositaries and registrars and may employ such counsel, agents and employees as in its opinion shall be necessary or useful, and may delegate any power or authority as well as discretion. If the Committee shall appoint any sub-depositaries, it may make such regulations with respect to their duties

and functions as to it shall seem advisable, and may provide that any Certificate of Deposit issued by any sub-depositary shall be transferable at the office of the Depositary as well as at the office of the sub-depositary issuing the same.

15. The deposited stock and any stock of the New Company received by the Committee shall be held by the Depositary and any sub-depositary or agent for the Depositary subject to the orders of the Committee, and neither the Depositary nor any sub-depositary or agent for the Depositary shall incur any liability for anything done or permitted to be done at the request or direction of the Committee. The Depositary and any sub-depositary or agent for the Depositary shall be bound to exercise only reasonable care in the safekeeping of the deposited stock and of any other securities or cash which may be deposited with or [fol. 64] held by them hereunder respectively, and to deal therewith in accordance with the directions of the Committee.

The Depositary or any sub-depositary may resign upon thirty days' notice in writing to the Committee, and the Committee shall have power to remove the Depositary or any sub-depositary and from time to time in its discretion to fill any vacancy however arising in the office of the Depositary or any sub-depositary. In the event of the resignation or removal of the Depositary or any sub-depositary, it shall deliver all cash, securities, property and records held by it hereunder as directed by the Committee.

16. The enumeration of specific powers herein conferred upon the Committee shall not be construed to limit or to restrict general powers herein conferred or intended so to be, and it is hereby declared that it is intended to confer upon the Committee in respect of all deposited stock and in all other respects any and all powers which the Committee may deem expedient for carrying out or promoting the purposes of the Plan and this Agreement in any respect, even though any such power be apparently of a character not now contemplated; and the Committee may exercise any and every such power as fully and effectively as if the same were herein distinctly specified and as often as for any reason it may deem expedient.

17. No statement contained in the Plan or in this Agreement, or in any document, circular letter, notice or com-

munication at any time issued or published by the Committee, by the Depositary, by any sub-depositary or agent for the Depositary, by the United States Company, by the Raybestos Company, by the Manhattan Company, by the [fol. 65] New Company or by any officer or attorney of any of said corporations or by any other person, is intended to be, or is to be accepted as, a representation or warranty or a condition of the Plan or this Agreement; and no error, defect or irregularity herein or therein, or in any such document, circular letter, notice or communication, shall release any Depositor, or affect or release any deposit hereunder, except by written consent of the Committee.

18. The Plan and this Agreement shall bind and benefit the several parties hereto, and each and all the survivors, heirs, executors, administrators and assigns of said parties, and of each of them. The rights of the Depositors shall be such only as are conferred by the Plan and this Agreement and shall be subject to compliance by the Depositors with the terms and conditions set forth therein and herein.

19. This Agreement may be executed in several counterparts and all such counterparts shall be taken together as forming one agreement. Upon the execution of this Agreement by the members of the Committee or a majority of them, an executed counterpart shall be deposited with the Depositary.

In Witness Whereof, the members of the Committee have executed this Agreement and the Depositors have become parties hereto by depositing their certificates of stock hereunder, as above set forth, all as of the date first above recited.

S. R. Zimmerman, George R. Weber, Robert W. Atkins, Committee.

[fol. 66] EXHIBIT "D" TO PETITION

The Manhattan Rubber Manufacturing Company

Office of the President

To holders of stock of The Manhattan Rubber Manufacturing Company:

Representatives of your Company and of The Raybestos Company, a Connecticut corporation, and United States

Asbestos Company, a Pennsylvania corporation, have developed a plan for combining the businesses of such companies. Such plan, it is believed, will prove of great advantage to the business and stockholders of all three companies. Under this plan, described in the accompanying "Plan and Agreement" to which you are referred, it is contemplated that a corporation (hereinafter called "the New Company") will acquire, directly or indirectly, by purchase, merger, consolidation or otherwise, all of the assets of the three companies, and will assume all of their obligations and liabilities.

The New Company is to have an authorized capital consisting of 1,000,000 shares without par value, of which it is planned to issue 631,012 shares in replacement of the shares of stock of The Manhattan Rubber Manufacturing Company, The Raybestos Company, and United States Asbestos Company. Prior to the consummation of the Plan the outstanding issues of Preferred Stock of The Raybestos Company and United States Asbestos Company will be called for redemption. The holders of Common Stock of the three companies will receive Common Stock of the [fol. 67] New Company in replacement of their present stock on the following basis:

	Shares of Common Stock Now Outstanding	Shares of Common Stock of New Company
1-25/100 shares of stock of the New Company for each share of stock of The Manhattan Rubber Manufacturing Company.	200,000 ($25 par value) (The Manhattan Rubber Manufacturing Company).	250,000
2-25/100 shares of stock of the New Company for each share of Common Stock of The Raybestos Company.	118,672 ($25 par value) (The Raybestos Company).	267,012
1-14/100 shares of stock of the New Company for each share of Common Stock of United States Asbestos Company.	100,000 (no par value) (United States Asbestos Company).	114,000

An additional 45,000 shares of Common Stock of the New Company is also to be sold for cash to replace funds required for the retirement of Preferred Stock of existing companies and for the general purposes of the New Company.

Upon the consummation of the Plan the New Company will have no funded debt and no preferred stock and will

have ample working capital. Combined earnings of the three companies for 1928 available for dividends, as shown by their audited statements, amounted to $2,465,586, equivalent to $3.65 per share for the year 1928 on the stock of the New Company which will be outstanding upon the consummation of the Plan. Combined earnings for the first quarter of 1929, as reported by the three companies, amounted to $888,417, equivalent to $1.31 per share for such quarter on such stock. It is expected that the New Company will inaugurate a dividend policy resulting in a return to each stockholder on his holdings in the New Company not less than the dividend return on his holdings in the present company.

[fol. 68] It is believed that combining the business of the three companies will bring about substantial economies both in manufacturing and selling expenses. The combined business will also make a better rounded and more complete industrial unit. With a view of furnishing the stockholders a wider market for their holdings, application will be made to list the stock of the New Company on the New York Stock Exchange.

Messrs. Townsend, Green and Curtis of your Board of Directors will serve as a Committee to receive deposits of stock under the Plan and have caused to be prepared the Plan and Agreement under which such deposit may be made. Depositors will not be called upon to pay any compensation or expenses of the Committee or any other expenses.

Holders of more than a majority of the stock of your Company and holders of more than a majority of the common stock of the other two companies have already approved the Plan and have agreed to deposit their stock. Prompt cooperation by all stockholders in the deposit of their stock will greatly facilitate the consummation of the Plan, and is necessary to assure participation in the Plan.

As provided in the Agreement the record holders of Certificates of Deposit will receive dividends paid on the deposited stock pending the consummation of the Plan. Upon deposit of the stock the Depositary will issue Certificates of Deposit which will be transferable in the same way as the stock certificates.

Deposited stock certificates must be duly endorsed in blank for transfer or accompanied by duly executed stock powers and signatures must be guaranteed by a bank or

trust company having an office or correspondent in Passaic, [fols. 69 & 70] New Jersey, or in the City of New York, or by a New York stock exchange firm. Transfer tax stamps need not be attached, except where it is requested that a Certificate of Deposit be issued in the name of someone other than the holder of record of the deposited stock. Stockholders should forward their stock certificates with the enclosed letter of transmittal immediately to Passaic National Bank and Trust Company, Passaic, New Jersey, Depositary.

Deposit of stock will constitute assent to the Plan and Agreement. If the Plan should fail of consummation because of insufficient deposited stock or otherwise, the deposited stock will be returned to the depositors without charge.

The Committee has fixed June 17, 1929, as the last day for making deposits under the Plan.

The Board of Directors of your company by a resolution unanimously adopted has recommended that the stockholders of the company deposit their stock under the Plan. On behalf of the Board of Directors and as President of your company I recommend that you promptly deposit your stock.

A. F. Townsend, President.

May 22, 1929.

NOTE: Requests for further information should be addressed to the Secretary of the Committee, Mr. F. L. Curtis, 61 Willett Street, Passaic, N. J.

[fols. 71 & 72] The Manhattan Rubber Manufacturing Company. Plan and Agreement, Dated May 22, 1929. A. F. Townsend, H. M. Green, F. L. Curtis, Committee. F. L. Curtis, Secretary, 61 Willett St., Passaic, N. J. Depositary, Passaic National Bank and Trust Company, Passaic, N. J.

[fol. 73] Plan

It is proposed that all of the business and assets of The Manhattan Rubber Manufacturing Company, a New Jersey corporation (herein and in the annexed Agreement called "the Manhattan Company"), The Raybestos Company, a Connecticut corporation (herein and in the annexed Agreement called "the Raybestos Company"), and United States Asbestos Company, a Pennsylvania corpo-

ration (herein and in the annexed Agreement called "the United States Company"), shall be acquired directly or indirectly, by purchase, merger, consolidation or otherwise, by a corporation (herein and in the annexed Agreement called "the New Company"), the New Company to assume all of the liabilities and obligations of the United States Company, the Raybestos Company and the Manhattan Company.

The New Company shall have an authorized capital of 1,000,000 shares of common stock, without par value, and may be a new corporation organized under the laws of any state selected by the Committee contsituted by the Agreement annexed hereto or, at the election of such Committee, the New Company may be any one of the above-named companies with appropriate change of its present capital structure and charter.

The stockholders of the above-named companies are to receive stock of the New Company on the following basis:

1¼ shares of common stock of the New Company for each share of stock of the Manhattan Company.

[fol. 74] 2¼ shares of common stock of the New Company for each share of common stock of the Raybestos Company.

1-14/100 shares of common stock of the New Company for each share of common stock of the United States Company.

In lieu of any fraction of a share of common stock of the New Company deliverable to any stockholder of any of the above-named companies, there will be issued non-voting and non-dividend-bearing common stock scrip, exchangeable, in amounts calling for one or more full shares, for a certificate for such share or shares.

On the above basis, there will be required for distribution to the common stockholders of the Manhattan Company, the Raybestos Company and United States Company, an aggregate of 631,012 shares of common stock of the New Company. The New Company will sell a further 45,000 shares of such stock for cash to provide additional capital.

Prior to the consummation of the Plan, the preferred stocks of the United States Company and the Raybestos Company will be called for redemption.

The Committee constituted by the annexed Agreement shall have full discretion as to the method of carrying the

Plan into effect and the legal procedure incident thereto and also as to the amount of stock of the Manhattan Company which must be deposited under this Plan and the annexed Agreement in order to make the consummation of the Plan practicable.

[fol. 75] Agreement

Agreement, dated May 22, 1929, by and between A. F. Townsend, H. M. Green and F. L. Curtis (hereinafter called the "Committee"), parties of the first part, and such holders of stock of The Manhattan Rubber Manufacturing Company, a New Jersey corporation (hereinafter called the "Manhattan Company"), as shall become parties hereto in the manner hereinafter provided and their successors in interest (hereinafter collectively called "the Depositors"), parties of the second part.

In consideration of the consent and undertaking of the Committee to act as such in behalf of the Depositors as hereinafter set forth, and of the mutual agreements herein contained, and for other good and valuable considerations, the parties hereto agree, each Depositor agreeing with each of the other Depositors and with the Committee, as follows:

1. The Depositors hereby constitute and appoint A. F. Townsend, H. M. Green and F. L. Curtis, a Committee, with all of the powers, rights and privileges by this Agreement conferred upon the Committee.

2. The accompanying Plan is and shall be taken to be a part of this Agreement, with the same effect as though each and every provision thereof had been embodied herein, and said Plan and this Agreement shall be read as parts of one and the same instrument.

3. Holders of stock of the Manhattan Company may become parties hereto by depositing the certificates representing such stock hereunder with the Depositary hereinafter in paragraph 4 designated or with any sub-depositary appointed as hereinafter provided, on or before the close of business on June 17, 1929, or such later date as the Committee from time to time may fix as hereinafter pro- [fol. 76] vided. Each stock certificate so deposited must be duly endorsed in blank for transfer or accompanied by a duly executed stock power in form approved by the

Committee, and must be accompanied by such evidence as the Committee may in any case require of the genuineness and sufficiency of such endorsement or stock power. Except where it is requested that a Certificate of Deposit be issued in the name of someone other than the record holder of the stock deposited, transfer tax stamps need not be attached, the cost of any such stamps which may be required to be affixed being part of the expenses of the Committee under the Plan and this Agreement. Every stockholder who shall so deposit his stock certificate or certificates shall be held to have assented to, and shall be bound by the provisions of, the Plan and this Agreement in the same manner and with the same effect as if he had executed the same.

The Committee shall have full power in its discretion from time to time, in general or in particular instances, and upon such general or special terms and conditions as it may see fit, to extend the time for the making of deposits under the Plan and this Agreement, and to accept the deposit of any of such stock under the Plan and this Agreement after the period at any time limited for such deposit shall have elapsed.

4. Upon depositing his stock as aforesaid, each Depositor will receive a Certificate or Certificates of Deposit in the name of the Depositor, specifying the number of shares deposited and reciting that such stock has been deposited hereunder, and otherwise in such form as shall be prescribed by the Committee, signed by the Depositary hereinafter designated or a sub-depositary appointed as hereinafter provided.

[fol. 77] The Committee hereby appoints Passaic National Bank and Trust Company, Passaic, N. J., Depositary of the Committee.

The Depositary shall keep at its office books (which shall be deemed books of the Committee) and shall record in such books the names and addresses (as furnished) of all persons to whom Certificates of Deposit are issued by the Depositary and shall likewise record in such books all transfers of Certificates of Deposit made by the Depositary.

The interests represented by the Certificates of Deposit issued hereunder shall be transferable, subject to the terms

and conditions of the Plan and this Agreement, on the books of the Committee by the holders thereof in person or by duly authorized attorney upon surrender of such Certificates of Deposit, properly endorsed, accompanied with any transfer tax stamps required by law. Thereupon a new Certificate or Certificates of Deposit, shall be issued in the name of the transferee. Each transferee of any Certificate of Deposit shall be deemed to be a Depositor and shall be a party to this Agreement, and, as such, entitled to the same rights and privileges, and in every way as fully bound by and subject to the Plan and this Agreement, as the original Depositor.

Title to the Certificates of Deposit, when duly endorsed, shall be transferable, to the extent permitted by law, with the same effect as in the case of negotiable instruments. Each holder of a Certificate of Deposit by acceptance thereof shall be deemed to consent and agree that delivery by any bearer thereof of such Certificate of Deposit, duly endorsed in blank, shall vest the title thereto and all rights and interests represented thereby in the transferee to the [fol. 78] same extent, for all purposes, as would delivery under like circumstances of a negotiable instrument payable to bearer; provided, however, that the Depositary and any sub-depositary and the Committee may treat the record holder of any Certificate of Deposit (or, when presented duly endorsed in blank, the bearer thereof) as the absolute owner thereof for all purposes, and shall not be affected by any notice to the contrary.

The Committee may make provision for the replacement of any Certificates of Deposit which shall be lost, stolen or destroyed or which shall become mutilated.

5. The Committee is hereby authorized and empowered to construe the Plan and this Agreement, and the Committee's construction of the same, made in good faith, shall be final, conclusive and binding. The Committee may supply any defect or omission in the Plan and this Agreement and reconcile any inconsistency therein.

6. Each and every Depositor hereby authorizes and requests the Committee, as the Depositor's agent and attorney-in-fact, to endeavor to carry the Plan into practical operation, in such form and in such manner and by such steps as the Committee in its uncontrolled discretion shall

deem best, and for this purpose the Committee is empowered hereby to exercise all the rights of the Depositors with respect to the deposited stock. The methods to be adopted in carrying out the Plan and this Agreement shall be entirely discretionary with the Committee and the Plan and this Agreement are in all respects to be liberally construed so as to enable the Committee to carry into effect the purposes of the Plan.

[fol. 79] The deposit of shares of stock in accordance with the provisions of the Plan and this Agreement shall not constitute an assignment thereof, but the title to the deposited stock shall remain in the Depositors thereof unless and until the Committee shall elect to take title thereto and file with the Depositary a certified copy of its resolution so electing, whereupon title thereto shall vest in the Committee as joint tenants and not as tenants in common, and in the survivor or survivors of the Committee and their successors, or at the option of the Committee, expressed in such resolution, in its nominee or nominees. The Depositors severally agree that, at any time when the Committee shall have elected to take title to the deposited stock, they will execute and deliver any and all further transfers and assignments or other writings requested by the Committee in order more effectively to vest the ownership of the deposited stock in the Committee, its nominee or nominees. Unless and until the Committee shall so elect to take title thereto and file with the Depositary a certified copy of its resolution so electing, any and all directions to the Depositary respecting any such shares of stock, and any and all disposition by the Committee of any such shares of stock, and any and all action of the Committee with respect to any such shares of stock, shall be as the irrevocable agent and attorney-in-fact of the Depositors.

7. The Committee may take any and all steps and proceedings, and do any and all acts and things, and execute and deliver any and all documents, which it shall deem necessary, expedient or desirable for the purpose of carrying out the Plan and this Agreement, or for the purpose of asserting, protecting or enforcing the rights or interests of the Depositors, or for any other purpose thereof. Without [fol. 80] prejudice to the general powers herein granted, the Committee, for the purpose of carrying out the Plan and this Agreement, may procure the organization of one

or more new corporations under such name as it shall determine or may adopt or use any existing or future corporations with such change of name, if any, as it shall determine, and, with respect to the Manhattan Company or its assets and business, may make or cause to be made such consolidations, mergers, purchases, sales or other arrangements, and may cause to be made such charter amendments and changes in capital structure, and may take such other steps, as the Committee may deem advisable; and may form or procure the formation of any syndicate or syndicates, of which the Committee, or any member or members thereof, acting alone or in association with others, may be the manager or managers. The Committee, in its discretion, may leave undisturbed the rights of stockholders of the Manhattan Company who do not deposit their stock under the Plan and this Agreement, or may make or approve such provisions for such stockholders as the Committee may deem expedient.

Without prejudice as aforesaid, the Depositors hereby severally irrevocably authorize and empower the Committee (as the holder of the deposited stock, provided the Committee shall have taken title thereto as hereinabove permitted, or otherwise as the attorney and/or proxy of the Depositors) to call or waive notice of, and to attend in person or by proxy or substitute proxy or by proxy appointed by the Committee as the agent and attorney-in-fact of the Depositors, any and all meetings of stockholders of the Manhattan Company and to vote or cause to be voted, or to consent with respect to, any or all of the deposited stock in [fol. 81] any manner and for any purpose deemed by the Committee to be advisable for the carrying out of the Plan and this Agreement, expressly including among such purposes the amendment of the charter of the Manhattan Company in any manner which the Committee, being advised by counsel, shall deem advisable to facilitate the consummation of the Plan, and any transfer or conveyance of assets contemplated thereby; and the Depositors hereby severally irrevocably authorize and empower the Committee, with respect to any stock of the New Company received by the Committee (until the same shall have been distributed, as contemplated by the Plan, to the Depositors entitled ultimately to receive the same), to deal with such stock as the irrevocable agent and attorney-in-fact of the Depositors, and to call or waive notice of and to attend in person or by

proxy or substitute proxy or by proxy appointed by the Committee as the agent and attorney-in-fact of the Depositors, any and all meetings of stockholders of the New Company and to vote or cause to be voted, or to consent with respect to, any or all of such stock in any manner and for any purpose deemed by the Committee to be advisable for the carrying out of the Plan. The Committee is authorized and empowered as Attorney-in-Fact of each and every of the Depositors to execute, for and in the name of the Depositors or in the name of the Committee, any and all proxies, waivers, consents and other documents deemed by the Committee desirable to facilitate the consummation of the Plan.

No expense incurred by, or compensation of, the Committee or any other expenses shall be charged against the Depositors or against any of the deposited stock, the Manhattan Company having agreed to pay the same.

[fol. 82] 8. The Depositors hereby severally irrevocably authorize and empower the Committee to receive, and irrevocably authorize and direct the Manhattan Company and the New Company to pay to or on the order of the Committee all dividends paid on the deposited stock so long as it shall remain on deposit hereunder or on stock of the New Company received by the Committee (until the same shall have been distributed, as contemplated by the Plan, to the Depositors entitled ultimately to receive the same). When and as any dividends shall be receivable by the Committee on deposited stock or on such stock of the New Company, the Committee will direct the Manhattan Company or the New Company, as the case may be, to pay the same to the persons who on the books of the Committee to be kept by the Depositary shall be the record holders of Certificates of Deposit representing such stock at the close of business on the date as of which the Manhattan Company or the New Company determines its recorded stockholders entitled to receive such dividend; such payments to be made to the holders of such Certificates of Deposit ratably according to the number of deposited shares represented by such Certificates respectively.

9. Upon compliance with all the terms and conditions of the Plan and this Agreement, Depositors will be entitled to receive, upon the consummation of the Plan, and upon surrender of their Certificates of Deposit, the stock, and

scrip for fractions of shares of stock, of the New Company (but only as and when issued and ready for delivery) to which they shall be entitled pursuant to the terms and provisions of the Plan and this Agreement.

The Committee, subject to the provisions of this Agreement, is authorized and empowered to prescribe terms and [fol. 83] conditions as to the surrender of Certificates of Deposit with which holders of Certificates of Deposit must comply in order to receive the stock, and scrip for fractions of shares of stock, of the New Company receivable by the Depositors under the Plan, and for the purpose of facilitating the delivery thereof, the Committee may order the books of the Committee for the transfer of Certificates of Deposit to be permanently closed against the making of transfers upon a date not less than ten days after mailing notice of such closing of the books to the Depositors in accordance with the provisions of Section 13 hereof.

The Depositors hereby severally irrevocably authorize and empower the Committee, upon and after any transfer of the business and assets of the Manhattan Company to the New Company in accordance with the Plan, to take such action or initiate or participate in such proceedings by way of disposing of, extinguishing or otherwise dealing with the deposited stock of the Manhattan Company as the Committee in its discretion shall determine.

10. The Committee may abandon the Plan at any time if in its discretion the Committee shall deem it impracticable to carry the same into execution. Such abandonment shall be effected by resolution of the Committee, and notice thereof shall be lodged with the Depositary, and mailed to the Depositors in accordance with the provisions of Section 13 hereof. Thereafter any Depositor may withdraw the stock of the Manhattan Company represented by his Certificate of Deposit. In the absence of such notice of abandonment no Depositor may withdraw stock of the Manhattan Company represented by his Cer- [fol. 84] tificate of Deposit or withdraw from this Agreement prior to June 1, 1930. If the Plan shall not have been carried into execution by that date, any Depositor may thereafter withdraw the stock of the Manhattan Company represented by his Certificate of Deposit.

The Committee, subject to the provisions of this Agreement, is authorized and empowered to make reasonable regulations as to the procedure to be followed by holders of Certificates of Deposit in withdrawing, in either of the events aforesaid, the stock of the Manhattan Company represented by their Certificates of Deposit, and for the purpose of facilitating delivery of such stock the Committee may order the books for the transfer of Certificates of Deposit to be permanently closed against the making of transfers upon a date not less than ten days after mailing notice of such closing of the books to the Depositors in accordance with the provisions of Section 13 hereof.

11. Every holder of a Certificate of Deposit, by the surrender thereof to the Committee and the receipt of certificates representing the deposited stock, or the stock, and scrip for fractions of shares of stock, of the New Company, deliverable to him hereunder, shall be deemed to have released and discharged the Committee, the Depositary and all other persons from all liability and accountability of any and every kind hereunder.

After the books for the transfer of Certificates of Deposit shall have been closed against the making of transfers (whether upon the consummation of the Plan or upon its abandonment) the Committee, whenever there shall be lodged with the Depositary

(a) in case the Plan shall have been consummated, the stock, and scrip for fractions of shares of stock, of the New [fol. 85] Company which Depositors holding outstanding Certificates of Deposit shall be entitled to receive under the Plan and this Agreement, or

(b) in case the Plan shall have been abandoned, the stock of the Manhattan Company represented by the outstanding Certificates of Deposit,

may instruct the Depositary to hold the stock, and scrip for fractions of shares of stock, of the New Company, or the stock of the Manhattan Company, as the case may be, so lodged with it for the holders of outstanding Certificates of Deposit and to distribute the same to such holders upon surrender to it of their Certificates of Deposit; and, such stock having been so lodged and such instructions so given, the Committee shall be under no responsibility to the De-

positors, and the rights of the Depositors shall be limited to receiving from the Depositary the stock, and scrip for fractions of shares of stock, of the New Company, or the stock of the Manhattan Company, as the case may be, so held by the Depositary.

12. Neither the Committee nor the Depositary nor any sub-depositary is to be under any obligation, legal or equitable, express or implied, to any holder of stock of the Manhattan Company who shall not deposit the same hereunder, or to any person whomsoever, other than the holders of Certificates of Deposit issued in accordance with the terms hereof. With respect to the holders of such Certificates of Deposit, the Committee undertakes to endeavor in good faith to carry out the Plan and this Agreement, but neither the Committee nor any member thereof nor the Depositary nor any sub-depositary assumes any responsibility for the carrying out of the Plan and this Agreement or for the result of any steps taken or acts done for the purpose thereof. Neither the Committee nor any member thereof nor the De- [fol. 86] positary nor any sub-depositary shall be liable for any act or omission of any attorney, agent or employee, or for anything except for his or its own willful misconduct. Neither the Depositary nor any sub-depositary, by the delivery of any Certificate of Deposit hereunder, makes any representation or warranty of any sort whatsoever other than that it agrees to use its best judgment and good faith in the performance of its duties hereunder, and by the acceptance of any such Certificate of Deposit every holder expressly relieves the Depositary and each and every sub-depositary of any liability except as aforesaid. Neither the Committee nor any member thereof nor the Depositary nor any sub-depositary assumes any responsibility or liability as to the genuineness, validity or regularity of any of the stock, or scrip for fractions of shares of stock, of the New Company created or issued in connection herewith, or as to the validity or sufficiency of any corporate proceedings or acts of the Manhattan Company, the Raybestos Company, the United States Company, or the New Company.

Any member of the Committee or any corporation, association or partnership of which any member of the Committee may be an officer, director, member or partner, or the Depositary or any sub-depositary or any officer or director of any of them, may be or become pecuniarily interested in

any stock, Certificates of Deposit, subscription rights, contracts, property or matters which the Plan or this Agreement concerns, and may participate in any underwriting syndicate as syndicate manager, syndicate subscriber, or otherwise, and may be an officer or director of the Manhattan Company or of the Raybestos Company or of the United States Company or of the New Company. The Depositary [fol. 87] or any sub-depositary may be trustee under any agreement created or entered into in connection with the Plan, or otherwise act in any manner for the Manhattan Company or for the Raybestos Company or for the United States Company or for the New Company or for the holders of any of the stock of any of such corporations.

13 Any notice or other communication required or permitted by the provisions hereof to be sent to any Depositor shall be conclusively deemed to have been duly communicated if and when deposited in the United States mail, postpaid, addressed to such Depositor at his address appearing upon the books of the Committee kept by the Depositary.

An affidavit made before a notary public by the Secretary of the Committee, or by an officer or employee of the Depositary, with respect to the mailing of notices herein provided for shall be conclusive evidence of the giving of such notices.

14. The Committee, as from time to time constituted and notwithstanding any vacancy, shall have all the powers, rights and interests of the Committee as named in this Agreement. The Committee may elect a Chairman, and may appoint a Secretary (who may, but need not, be a member of the Committee) who shall keep a record of its acts and proceedings. From time to time the Committee may choose such other officers and designate or cause to be designated such committees or sub-committees (whose members may, but need not, be members of the Committee) as it may see fit, and may confer upon any of its officers, committees or sub-committees such powers as it may deem advisable. The Committee from time to time may add to its number by electing, by a majority vote of its then members, [fol. 88] an additional member or members, and the member or members so elected shall have all the powers, rights and interests of the members of the Committee under the Plan and this Agreement and, together with those herein named or their successors, shall constitute the Committee

under the Plan and this Agreement with like force and effect as though they were specifically named herein. Any member of the Committee may resign by filing written notice of his resignation with the Chairman or Secretary of the Committee. In case at any time a vacancy shall occur in the Committee by death or resignation, or from any other cause, such vacancy may, but need not, be filled by a majority of the then members of the Committee. Notices of changes in the membership of the Committee filed with the Depositary shall bind all parties hereto.

A majority of the members of the Committee shall constitute a quorum for all purposes, and all the powers of the Committee may be exercised by a majority of its then members either at a meeting, or in writing or by telegraph, wireless or cable without a meeting. A member of the Committee by written proxy may authorize any person (who may, but need not, be another member of the Committee) to act in his place for any and all purposes. The certificate of the Chairman or Secretary as to any action by the Committee shall be conclusive upon and full protection to the Depositary and all sub-depositaries and all other persons, and conclusive upon all Depositors, as to all acts and things so certified to have been done by the Committee. The Committee from time to time may make, alter and rescind such rules and regulations for the transaction of its business as it may deem advisable.

[fol. 89] The Committee may appoint such sub-depositaries and may employ such counsel, agents and employees as in its opinion shall be necessary or useful, and may delegate any power or authority as well as discretion. If the Committee shall appoint any sub-depositaries, it may make such regulations with respect to their duties and functions as to it shall seem advisable, and may provide that any Certificate of Deposit issued by any sub-depositary shall be transferable at the office of the Depositary as well as at the office of the sub-depositary issuing the same.

15. The deposited stock and any stock of the New Company received by the Committee shall be held by the Depositary and any sub-depositary subject to the orders of the Committee, and neither the Depositary nor any sub-depositary shall incur any liability for anything done or permitted to be done at the request or direction of the Committee. The Depositary and any sub-depositary shall

be bound to exercise only reasonable care in the safekeeping of the deposited stock and of any other securities or cash which may be deposited with or held by them hereunder respectively and to deal therewith in accordance with the directions of the Committee.

The Depositary or any sub-depositary may resign upon thirty days' notice in writing to the Committee, and the Committee shall have power to remove the Depositary or any sub-depositary and from time to time in its discretion to fill any vacancy however arising in the office of the Depositary or any sub-depositary. In the event of the resignation or removal of the Depositary or any sub-depositary, it shall deliver all cash, securities, property and records held by it hereunder as directed by the Committee.

[fol. 90] 16. The enumeration of specific powers herein conferred upon the Committee shall not be construed to limit or to restrict general powers herein conferred or intended so to be, and it is hereby declared that it is intended to confer upon the Committee in respect of all deposited stock and in all other respects any and all powers which the Committee may deem expedient for carrying out or promoting the purposes of the Plan and this Agreement in any respect, even though any such power be apparently of a character not now contemplated; and the Committee may exercise any and every such power as fully and effectively as if the same were herein distinctly specified and as often as for any reason it may deem expedient.

17. No statement containgd in the Plan or in this Agreement, or in any document, circular letter, notice or communication at any time issued or published by the Committee, by the Depositary, by any sub-depositary, by the Manhattan Company, by the Raybestos Company, by the United States Company, by the New Company or by any officer or attorney of any of said corporations or by any other person, is intended to be, or is to be accepted as, a representation or warranty or a condition of the Plan or this Agreement; and no error, defect or irregularity herein or therein, or in any such document, circular letter, notice or communication, shall release any Depositor, or affect or release any deposit hereunder, except by written consent of the Committee.

18. The Plan and this Agreement shall bind and benefit the several parties hereto, and each and all the survivors,

heirs, executors, administrators and assigns of said parties, and of each of them. The rights of the Depositors shall be such only as are conferred by the Plan and this Agree- [fol. 91] ment and shall be subject to compliance by the Depositors with the terms and conditions set forth therein and herein.

19. This Agreement may be executed in several counterparts and all such counterparts shall be taken together as forming one agreement. Upon the execution of this Agreement by the members of the Committee or a majority of them, an executed counterpart shall be deposited with the Depositary.

In witness whereof, the members of the Committee have executed this Agreement and the Depositors have become parties hereto by depositing their certificates of stock hereunder, as above set forth, all as of the date first above recited.

A. F. Townsend, H. M. Green, F. L. Curtis, Committee.

EXHIBIT "E" TO PETITION

Form 17
TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
Revised Aug., 1925

(Copy)

Notice and Demand for Tax

Original

Notice is hereby given that there has been assessed against you the amount of tax, penalty, and interest stated hereon. Demand is hereby made for immediate payment thereof. If payment is not made within ten days after date of this notice, the law provides that a penalty of 5 per cent of the amount of the assessment will be added, plus additional interest on such assessment at the rate of 1 per cent per month, until paid.

Date—February 3, 1933

May 8, 1933
Received with Remittance

Cashier.....

To avoid further penalty and interest the amount stated on this notice must be paid to Collector of Internal Revenue at Newark, N. J. within ten days from date stated above.

Name and Address	Items
RAYBESTOS-MANHATTAN, INC. 61 Willett Street, PASSAIC, NEW JERSEY	7,620.24

TO THE COLLECTOR OF INTERNAL REVENUE:

I enclose herewith remittance covering tax, penalties, and interest itemized below:

Tax		$7,620.24
Penalty	25%	
*Penalty	5%	
*Interest Assessed		
Total		$7,620.24

*Applicable to sales tax only.

RAYBESTOS-MANHATTAN, INC.

F. L. Curtis—Treasurer

.....
(signature of taxpayer)

Paid	Assessment	Description
	7,620.24	Doc. Stamp Tax Form 807 dated 0-5 12-24-32

Collector's Paid Stamp

Collector of Internal Revenue

Paid
May 8, 1933
Cashier

Newark, N. J.

Miscellaneous—December, 1932—F—404—L—O

Return this Form with Remittance

2-13640

19

[fol. 93]

EXHIBIT "F" TO PETITION

Form 843
TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
Revised June, 1930

CLAIM

TO BE FILED WITH THE COLLECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

COLLECTOR'S STAMP

(Date received)

REFUND OF TAX ILLEGALLY COLLECTED.
REFUND OF AMOUNT PAID FOR STAMPS UNUSED, OR USED IN ERROR OR EXCESS.
ABATEMENT OF TAX ASSESSED (not applicable to estate or income taxes).

STATE OF *NEW JERSEY*
COUNTY OF *Passaic* } ss:

TYPE OR PRINT

Name of taxpayer or purchaser of stamps: *Raybestos-Manhattan, Inc.*

Business address: *61 Willett Street, Passaic, New Jersey.*

Residence: *A Corporation of the State of New Jersey.*

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: *Collector of Internal Revenue in Newark, N. J.*
2. Period (if for income tax, make separate form for each taxable year) from ....., 19...., to ....., 19....
3. Character of assessment or tax: *Documentary Stamp Tax under Schedule A-3, 1926 Act.*
4. Amount of assessment, *$7,820.24;* dates of payment, *May 8, 1933.*
5. Date stamps were purchased from the Government.....
6. Amount to be refunded: *Assessment, plus interest ($165.11) paid $7,785.35*
7. Amount to be abated (not applicable to income or estate taxes) $.....
8. The time within which this claim may be legally filed expires, under Section .....of the Revenue Act of 19...., on....., 19.....

The deponent verily believes that this claim should be allowed for the following reasons:

It filed claim (No. M-41733) for the abatement of documentary stamp tax in the amount of $7,820.24, assessed under the provisions of Schedule A-3 of Section 800 of the Revenue Act of 1926 on 331,012 shares of Raybestos-Manhattan, Inc., common no par value stock, upon an alleged transfer of the right of the Raybestos Company, a Connecticut corporation, and United States Asbestos Company, a Pennsylvania corporation, to receive said shares in consideration of the surrender by stockholders of said corporations of the entire issued and outstanding shares of said corporations and in consideration of said corporations at the instance and request of their stockholders conveying all the business and assets, subject to all the liabilities [fol. 94] *and obligations, of The Raybestos Company and United States Asbestos Company, to Raybestos-Manhattan, Inc., a New Jersey corporation, formed to take over the entire assets, including good-will, and all the obligations and liabilities of The Raybestos Company and United States Asbestos Company, for the purpose of combining into an industrial unit the businesses of these two corporations, said 331,012, shares having been issued direct to the individual stockholders, as follows: 207,012 to stockholders surrendering shares of The Raybestos Company and 114,000*

shares to stockholders surrendering shares of United States Asbestos Company. Said Claim for the abatement of the tax assessed was founded upon legal principles and for reasons similar to those supported in the decision rendered August 19, 1932, by the District Court of the United States in and for the District of Minnesota, Third Division, at Law No. 2313 to the April Term, 1932, Minnesota Mining & Manufacturing Company, a corporation, Plaintiff, v. Levi M. Willcuts, Collector of Internal Revenue, Defendant, and more recently supported in the decision rendered February 11, 1933, by the Circuit Court of Appeals, Fifth Circuit, in the case of Shreveport-El Dorado Pipe Line Co., Inc. v. McGraw, 63 F. (2d) 202.

A conference on the claim for abatement was held in the Internal Revenue Building, Washington, D. C., on the afternoon of May 4, 1933, when deponent decided to stop interest running against the assessment by arranging to pay the amount demanded from it and to file this Claim for Refund, payment under protest not being a condition precedent hereto, but payment being considered essential to giving deponent a cause of action if its claim should be disallowed by the Commissioner.

The reasons for allowance of the claim for abatement will be the reasons presented for allowance of the Claim for Refund. Brief reviewing the facts and in support of such reasons will be filed with the Commissioner of Internal Revenue, at Washington, D. C.

Deponent contends that said Schedule A-3 contains nothing which indicates that the tax therein provided for was intended to be payable where, on the reorganization of a corporation or on the merger of two or more existing corporations, stock of the corporation before it was reorganized was exchanged for stock issued by the corporation as reorganized, or stock of corporations merging was exchanged for stock of a new company formed to effect the merger, the assets and liabilities remaining unchanged, and the capital interests of the several stockholders remaining unchanged, there being no real transfer of a corporate interest or of a right to acquire it where, after the consummation of the reorganization or merger, each stockholder legally owns substantially the same corporate interest which he owned before.

Sworn to and subscribed before
me this *15th* day of *May, 1933.*
Charles E. Cummings,
Notary Public

Signed: *Raybestos-Manhattan, Inc.,*
By S. Simpson
Its President

[fol. 95] EXHIBIT "G" TO PETITION

Treasury Department, Washington

Office of Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue and refer to MT:ST:NNH. C1:M:45185.

Dec. 12, 1933.

Raybestos-Manhattan, Inc., % LeFevre & LeRoy, Hibbs Building, Washington, D. C.

GENTLEMEN:

Reference is made to your claim for the refund of documentary stamp tax and interest in the amount of $7,785.35, assessed and paid as a tax on the transfer of the right to receive 381,012 shares of stock of no par value.

You state that the shares were issued in accordance with a plan and agreement whereby a committee was formed

with which was deposited shares of stock of The Rabestos Company(a Connecticut corporation) and the United States Asbestos Company (a Pennsylvania corporation) to be held by such committee pending the formation of your corporation. The agreement provided that the depositing stockholders were to receive shares of stock of the new corporation in lieu of the deposited stock. The new corporation was formed to which the assets of the two other [fol. 96] corporations were transferred, part of the consideration for such transfer being the issue of stock of the new corporation. You contend that the direct issuance of such shares to the depositing stockholders did not involve a transfer of the right to receive stock on the part of The Raybestos Company, and the United States Asbestos Company, inasmuch as the stock was issued in conformity with the agreement arranged by the committee. You refer to the cases of the Minnesota Mining & Manufacturing Company v. Willcuts, and Shreveport-El Dorado Pipe Line Company v. McGrawl, as supporting your view that the transfer tax was not due in this case.

In this connection you are advised that in the case of the Minnesota Mining & Manufacturing Company it was held that the effect of the transaction was an exchange by the new company of its stock for stock of the old company, and while it was held no transfer of the right of the old corporation to receive stock occurred, a tax was subsequently paid by the new corporation on the transfer to it of the stock of the old company. In the instant case it is shown that your corporation accepted offers of the Raybestos Company and the United States Asbestos Company to assign to you the assets of those corporations in consideration of the issuance to such corporations or upon their orders 381,012 shares of your stock of no par value. There was no provision for the exchange of stock by your corporation. This office has uniformly held that in such a case the old corporations have the right to receive the stock issued in consideration for their assets and the issuance of such stock direct to the stockholders involves a transfer on the part of the corporations of their right to receive the stock. It is, [fol. 97] therefore held that the tax was legally collected in this case and the claim is rejected.

In regard to the decision in the case of Shreveport-El Dorado Pipe Line Company, you are advised that the Bureau does not follow that decision.

Respectfully, Guy T. Helvering, Commissioner, by Adelbert Christy, Acting Deputy Commissioner.

HF:HM.

[fol. 98] II. General Traverse—Filed February 16, 1934

And now comes the Attorney General, on behalf of the United States, and answering the petition of the plaintiff herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Frank J. Wideman, Assistant Attorney General.

III. Argument and Submission of Case

On October 9, 1934, this case was argued and submitted on merits by Mr. Charles H. LeFevre and Mr. Howard S. LeRoy, for plaintiff, and by Mr. Guy Patten, for defendant.

[fol. 99] IV. **Special Findings of Fact, Conclusion of Law and Opinion of the Court by Littleton, J.**—Filed March 4, 1935.

Mr. Charles H. LeFevre and Mr. Howard S. LeRoy for plaintiff.

Mr. S. R. Zimmerman was on the brief.

Mr. Guy Patten, with whom was Mr. Assistant Attorney General Frank J. Wideman, for the defendant.

Plaintiff sues to recover $7,620.24 with interest, representing a transfer stamp tax of two cents a share collected under Schedule A-3 of section 800 of the Revenue Act of 1926 on the number of shares of its no-par-value capital stock issued in consideration for the assets acquired by it from the Raybestos Company and the United States Asbestos Company, namely, 267,012 shares and 114,000 shares,

respectively, totalling 381,012 shares. These shares were issued to the stockholders of the two corporations mentioned, pursuant to the direction of such corporations. These shares constituted the consideration for sale, transfer, and assignment by the Raybestos Company, a Connecticut corporation, and the United States Asbestos Company, a Pennsylvania corporation, of their entire property and assets to plaintiff, and the tax was exacted by the Commissioner as a tax on a transfer by the selling corporations of their "rights to receive such shares" to their stockholders.

Plaintiff contends that as such shares were issued directly to the stockholders of the former corporation in accordance with the plans under which the transactions were carried out, there was no transfer of any right to receive such shares by the corporations whose assets were taken over and that the stock was not otherwise subject to the two cents' tax under the statute.

Special Findings of Fact

1. The plaintiff, a New Jersey corporation with principal office in Passaic, was organized in 1929.

Its total authorized capital stock consists of 1,000,000 shares of common stock without nominal or par value. All such shares issued and outstanding, that are hereinafter mentioned, were issued as full-paid and nonassessable shares.

[fol. 100] 2. At the time of its incorporation, and for many years prior thereto, three separate and distinct industrial corporations, namely, the Raybestos Company, the Manhattan Rubber Manufacturing Company, and the United States Asbestos Company, existed and were doing business, each of which was owned, controlled and operated by entirely distinct and different interests, stockholders, and directors, and none had any interest, direct or indirect, in the business, assets, or properties of the others. The general character of each of the corporations, its business and assets, was as follows:

Raybestos Company

The Raybestos Company was incorporated under the laws of the State of Connecticut, on October 14, 1916, and succeeded to a business which had been established for more

than twenty years at that time. At all times since its incorporation until the sale of its assets and business to plaintiff, it was engaged in the manufacture of standard and specialized articles from asbestos, its principal products being "Raybestos" brake lining and clutch facings for automobiles. It was a pioneer in the industry—the original loom on which "Raybestos" was woven having been one of the first looms designed in America specifically for weaving asbestos brake lining. Through constant research in the origination, development, and improvement of friction fabrics for brakes and clutches, it kept pace with the progress of the automotive industry, and, at the time of the acquisition of its assets by the plaintiff herein, it was the largest purchaser and consumer in the world of long-fiber asbestos for spinning. It has spent, since its incorporation, more than $2,000,000 in advertising its products and name. There were over 3,500 service stations located throughout the United States and Canada licensed by it, and, in addition, over 40,000 garages which carried its products for replacement work. It also distributed its products in Europe through an agency maintained in London, England.

The main plant of the company was located in Bridgeport, Connecticut, with auxiliary plants owned directly or through subsidiaries in Stratford, Connecticut, and Peterborough, Canada. Through its wholly owned subsidiary, General Asbestos & Rubber Company, a South Carolina corporation, it also owned the largest asbestos spinning plants in the world, located in North Charleston, South Carolina. The property owned by it included a plant consisting of a parcel of land in Bridgeport with seven factory, four storage, and other miscellaneous buildings, a fifteen-acre factory site in Stratford, Connecticut, with three factory and seven miscellaneous buildings, and housing properties in Fairfield and Stratford, Connecticut. The property of its subsidiary, General Asbestos & Rubber Company, included eighty-seven acres of land in North Charleston, South Carolina, with five main buildings, auxiliary buildings and 248 dwellings for employees.

Manhattan Rubber Manufacturing Company

The Manhattan Rubber Manufacturing Company was incorporated under the laws of the State of New Jersey, on [fol. 101] October 28, 1933, and was engaged in the manu-

facture of mechanical rubber goods. Its chief products were transmission and conveyor belting, suction and fire hose, press rolls and packing material. The sales of this Company grew from approximately $2,000,000 in 1905 to more than $11,000,000 in 1928. Its plants were located at Passaic and Whippany, New Jersey. It maintained sales branches in the principal cities of the United States and had distributors in foreign countries. Its property included 10.8 acres of land at Passaic, New Jersey, with thirty-one factory buildings, other storage and auxiliary structures, and ten frame buildings on fifty-seven acres of land.

United States Asbestos Company.

United States Asbestos Company was incorporated under the laws of the Commonwealth of Pennsylvania on August 24, 1906. It was engaged in the manufacture and sale of asbestos products, "Grey Rock" brake lining, clutch facings, asbestos cloth, high pressure packing, braided packing, gaskets and other products, which it widely distributed to the manfacturing or wholesale trade. In 1928 it produced approximately 15,000,000 feet of brake lining and over 2,000,000 pieces of clutch facings. Its plant was located at Manheim, Pennsylvana, and consisted of eight factory buildings, thirty other miscellaneous buildings, and four dwellings.

3. On May 14, 1929, the Raybestos Company, the Manhattan Rubber Manufacturing Company, and the United States Asbestos Company entered into a written agreement, signed by the president of each, respectively, subject to the necessary action by directors and stockholders, in which, among other things, it was provided:

"1. A consolidated company shall be formed which either directly or through subsidiaries, using such method as may be approved by counsel, shall own the entire assets of each of the above-named companies. Such consolidated company may be any one of the existing companies or may be a new corporation formed for the purpose under the laws of such State as the parties shall determine.

"2. The capitalization of the consolidated company shall consist of 1,000,000 shares of common stock, such shares to be of no par value and all of one class. Of such authorized stock 631,012 shares shall be issued in exchange for or re-

placement of the shares of common stock of the companies now outstanding, and 45,000 shares shall be sold for cash, as hereinafter provided.

"3. The basis of the issue of stock of the consolidated company for or in replacement of stock of the above-named companies shall be as follows:

"(a) In the case of Raybestos, for the outstanding common stock of that company, consisting of 118,672 shares, there shall be issued 267,012 shares of the consolidated company, each stockholder of Raybestos receiving 2 25/100 shares of the consolidated company for each share of Raybestos common stock.

"(b) In the case of Manhattan, for the outstanding common stock of that company, consisting of 200,000 shares, there shall be issued 250,000 shares of the consolidated company, each stockholder of Manhattan receiving 1 25/100 shares of the consolidated company for each share of Manhattan common stock.

[fol. 102] "(c) In the case of United States, for the outstanding common stock of that company, consisting of 100,000 shares, there shall be issued 114,000 shares of the consolidated company, each stockholder of United States receiving 1 14/100 shares of the consolidated company for each share of United States common stock.

"4. The consolidated company will sell to Hayden, Stone & Co., Hemphill, Noyes & Co., and the Equitable Trust Company, all of New York City, or their nominees, 45,000 shares of stock for $30 per share in cash, under the terms of an agreement substantially in the form hereto annexed, the proceeds of such sale to be used to replace cash required for the retirement of the existing preferred stocks of Raybestos and United States, the balance of such proceeds to be used for the general purposes of the corporation.

"5. Each of the parties hereto will take such steps as may be necessary or expedient, including action by directors and stockholders, to effect the carrying out of the plan herein agreed to as promptly as may be practicable. Each of the parties shall by notice to the others promptly designate a representative to constitute a committee for the purpose of carrying out the plan. The consolidated company shall pay all expenses of every nature involved in

carrying out the plan and the issue and delivery of its stock."

A true copy of this agreement is attached to the petition as exhibit A and is made a part hereof by reference.

4. The directors of each corporation approved the agreement at directors' meetings held by the separate corporations for that specific purpose, and thereafter the agreements as approved at these meetings were submitted to the stockholders of the corporations for approval or rejection. The submission to stockholders was done by means of form letters mailed to the holders of common stock of the respective corporations from the offices of the presidents thereof, enclosing copies of a "Plan and Agreement" dated May 22, 1929, as applicable to each set of stockholders. Copies of the letters and their enclosures are attached to the petition marked exhibits B, C, and D, respectively, and are made a part of this finding by reference.

The letters and the "Plan and Agreement" in each case provided among other things that:

"Under this plan, described in the accompanying 'Plan and agreement', to which you are referred, it is contemplated that a corporation (hereinafter called 'the New Company') will acquire, directly or indirectly, by purchase, merger, consolidation, or otherwise, all of the assets of the three companies, and will assume all of their obligations and liabilities.

"Upon the consummation of the plan, the New Company will have no funded debt and no preferred stock and will have ample working capital.

"With a view of furnishing the stockholders a wider market for their holdings, application will be made to list the stock of the New Company on the New York Stock Exchange.

"Deposit of stock will constitute assent to the plan and agreement. If the plan should fail of consummation because of insufficient deposited stock or otherwise, the deposited stock will be returned to the depositors without charge.

[fol. 103] "The committee constituted by the annexed agreement shall have full discretion as to the method of carrying the plan into effect and the legal procedure incident thereto and also as to the amount of stock • • •

which must be deposited under this plan and the annexed agreement in order to make the consummation of the plan practicable.

"Each stock certificate so deposited must be duly endorsed in blank for transfer or accompanied by a duly executed stock power in form approved by the committee . . .

"The methods to be adopted in carrying out the plan and this agreement shall be entirely discretionary with the committee, and the plan and this agreement are in all respects to be liberally construed so as to enable the committee to carry into effect the purposes of the plan.

"The deposit of shares of stock in accordance with the provisions of the plan and this agreement shall not constitute an assignment thereof, but the title to the deposited stock shall remain in the depositors thereof unless and until the committee shall elect to take title thereto and file with the depositary a certified copy of its resolution so electing, whereupon title thereto shall vest in the committee as joint tenants and not as tenants in common, and in the survivor or survivors of the committee and their successors, or, at the option of the committee, expressed in such resolution, in its nominee or nominees. The depositors severally agree that, at any time when the committee shall have elected to take title to the deposited stock, they will execute and deliver any and all further transfers and assignments or other writings requested by the committee in order more effectively to vest the ownership of the deposited stock in the committee, its nominee or nominees.

"Upon compliance with all the terms and conditions of the plan and this agreement, depositors will be entitled to receive, upon the consummation of the plan, and upon surrender of their certificates of deposit, the stock and scrip for fractions of shares of stock, of the New Company (but only as and when issued and ready for delivery) to which they shall be entitled pursuant to the terms and provisions of the plan and this agreement."

5. All stockholders of each of the aforesaid corporations approved the consummation of the plan, as so submitted, and each such stockholder duly deposited his stock certificate or certificates with the appropriate depositary pursuant to and in conformity with the terms and conditions

prescribed and set forth in said "Plan and Agreement" dated May 22, 1929.

6. Plaintiff was duly organized and took out its articles of incorporation under and pursuant to the laws of the State of New Jersey on the 5th day of July 1929, for the purpose, among other things, of acquiring, owning, and operating the business, properties, and assets, including goodwill, of the aforesaid corporations, pursuant to the aforesaid agreement between the corporations dated the 14th day of May 1929, and the plan and agreement dated the 22nd day of May 1929. Its objects, as set forth in article third of its amended certificate of incorporation filed on July 19, 1929, include manufacturing and dealing in all kinds of asbestos, [fol. 104] rubber, and general loom products, such as brake linings, clutch facings, packings, belting, hose, and automobile accessories.

Thereafter, the entire business and assets of the Manhattan Rubber Manufacturing Company, a New Jersey Corporation, subject to its liabilities and obligations, were acquired by plaintiff pursuant to a merger of the plaintiff and the Manhattan Rubber Manufacturing Company, effected under the provisions of the General Corporation Act of New Jersey, as amended, such merger vesting in the plaintiff all and singular the rights, privileges, powers, and franchises of each of the corporations and all property, real, personal, and mixed, and all debts due on whatever account of the Manhattan Rubber Manufacturing Company, plaintiff issuing ratably and directly to the individual owners of 200,000 shares of the Manhattan Rubber Manufacturing Company common stock, in replacement of their stock interests, 250,000 shares of plaintiff's common stock without nominal or par value.

7. The plaintiff herein acquired the entire business, assets, and goodwill (except the corporate franchise) of the Raybestos Company, subject to its liabilities, (and the assets, business, and goodwill of any and all of its subsidiary corporations, subject to their liabilities), both tangible and intangible, in exchange for 267,012 shares of the common stock of the plaintiff corporation. The property so acquired by agreement was conveyed to it by proper deeds, assignments, bills of sale, and other instruments duly executed and delivered by the Raybestos Company,

all in due and necessary form, sufficient to effect the full and complete transfer and conveyance of said property. The 267,012 shares of the common stock of the plaintiff were issued by it directly to the stockholders of the Raybestos Company in the proportion of 2.25 shares for each share of stock owned by them in the Raybestos Company. The foregoing transactions were all in pursuance of the agreement dated the 14th day of May 1929, the "Plan and Agreement" dated the 22d day of May 1929, and pursuant to a contract entered into between the plaintiff and the Raybestos Company dated September 9, 1929. A copy of the last-named contract is attached to the petition as exhibit H, and is made a part hereof by reference. In this contract it was agreed that the Raybestos Company "will transfer, deliver, and assign to" the plaintiff "all the assets, business, and goodwill of the company, as the same shall exist at the date of such closing, subject to its liabilities, • • • and all of the outstanding capital stock of its subsidiary corporations • • • or, if so requested in writing • • •, all the assets, business, and goodwill of such of said subsidiary corporations as shall be designated in such request subject to their liabilities. In exchange therefor", the plaintiff "will deliver to the company or upon its order certificates for 267,012 shares of your [its] common stock without par value, which certificates will be delivered for account of and will represent shares of such stock issued directly to the holders of common stock of the company, pursuant to said plan, on the basis of two and one-fourth shares of your [its] common stock for each share of the company's common stock held by each such stockholder • • •."

8. Thereafter the plaintiff acquired the entire business, assets, and goodwill (except the corporate franchise) of [fol. 105] the United States Asbestos Company, a Pennsylvania corporation, subject to its liabilities, (and the assets, business, and goodwill of any or all of its subsidiary corporations, subject to their liabilities), both tangible and intangible, in exchange for 114,000 shares of the common stock of the plaintiff corporation. The property so acquired by agreement was conveyed to it by proper deeds, assignments, bills of sale, and other instruments duly executed and delivered by the United States Asbestos Company, all in due and necessary form, sufficient to effect the

full and complete transfer and conveyance of the property. The 114,000 shares of the common stock of the plaintiff were issued by it directly to the stockholders of the United States Asbestos Company in the proportion of 1.14 shares for each share of stock owned by them in the United States Asbestos Company. The foregoing transactions were all in pursuance of the agreement dated the 14th day of May, 1929, the "Plan and Agreement" dated the 22nd day of May 1929, and pursuant to a contract entered into between the plaintiff and the United States Asbestos Company dated September 9, 1929, of exact tenor with exhibit H, attached hereto and made a part hereof by reference. The contract of September 9, 1929, contained the same provisions as adapted to the United States Asbestos Company, quoted therefrom in finding 7 hereof.

9. Thereafter by letter dated October 13, 1932, plaintiff was notified by the Treasury Department, Internal Revenue Bureau, that it was subject and liable to a transfer tax of two cents a share under schedule A-3 of section 800 of the Revenue Act of 1926 on the number of shares of its capital stock issued as the consideration for the assets acquired by it from the Raybestos Company and the United States Asbestos Company, to wit: 267,012 shares and 114,000 shares, respectively, making a total of 381,012 shares, the tax amounting to $7,620.24. A copy of the letter is attached hereto, marked "Exhibit I", and is made a part hereof by reference.

10. Thereafter, upon notice and demand by the collector of internal revenue at Newark, New Jersey, on February 3, 1933, and after protest duly made thereto, plaintiff paid the tax of $7,620.24, together with $165.11 interest thereon, making a total of $7,785.35, on May 8, 1933.

11. May 15, 1933, plaintiff duly filed its claim for refund in which it asked for the refund of the tax and interest of $7,785.35, upon the ground that:

"Deponent contends that said schedule A-3 contains nothing which indicates that the tax therein provided for was intended to be payable where, on the reorganization of a corporation or on the merger of two or more existing corporations, stock of the corporation before it was reorganized was exchanged for stock issued by the corporation as

reorganized, or stock of corporations merging was exchanged for stock of a new company formed to effect the merger, the assets and liabilities remaining unchanged, and the capital interests of the several stockholders remaining unchanged, there being no real transfer of a corporate interest or of a right to acquire it where, after the consummation of the reorganization or merger, each stockholder legally owns substantially the same corporate interest which he owned before."

[fol. 106]. This claim for refund was rejected by the Commissioner, December 12, 1933.

12. Plaintiff paid a tax of five cents a share on each original issue of its common stock without nominal or par value, which, it is conceded, was legally taxed, and it paid under protest the additional tax of two cents a share (in issue here) on the claimed transfers of 267,012 of its shares to the stockholders of the Raybestos Company, of Connecticut, and of 114,000 of its shares to the stockholders of the United States Asbestos Company, of Pennsylvania. Plaintiff contends in this suit, as it did in its refund claim, that such issue of its shares directly to the stockholders rather than to the corporations did not in fact effect a transfer of a right to receive such shares within the meaning of schedule A-3, section 800 of the Revenue Act of 1926.

13. The United States Asbestos Company was dissolved by the Court of Common Pleas of Lancaster County, Pennsylvania, September 27, 1930. The dissolution was not made immediately because of pending litigation. The Raybestos Company has not been dissolved, but has continued in existence because of patent rights which are not assignable. The Manhattan Rubber Manufacturing Company, of New Jersey, lost its identity by merging with the Raybestos-Manhattan, Inc., the plaintiff herein.

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that plaintiff is not entitled to recover, and its petition is therefore dismissed.

Judgment will be rendered against plaintiff for the cost of printing the record herein, the amount thereof to be entered by the clerk and collected by him according to law.

OPINION

LITTLETON, Judge, delivered the opinion of the court:

The question in this case arises as a result of the issuance by plaintiff of a certain number of shares of its capital stock as a consideration for the business and assets of the Raybestos Company and the United States Asbestos Company. All the liabilities of each company were assumed by the plaintiff.

In connection with these transactions a merger was effected under the laws of New Jersey between plaintiff and the Manhattan Rubber Manufacturing Company, both being New Jersey corporations, by which plaintiff acquired all the assets of the Manhattan Company. No tax question growing out of the stock issued by plaintiff from that transaction is involved in this case.

Section 800, schedule A-3, of the Revenue Act of 1926 provides as follows:

"Sec. 800. On and after the expiration of thirty days after the enactment of this Act there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title, or for or in [fol. 107] respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, are written or printed, by any person who makes, signs, issues, sells, removes, consigns, or ships the same, or for whose use or benefit the same are made, signed, issued, sold, removed, consigned, or shipped, the several taxes specified in such schedule. The taxes imposed by this section shall, in the case of any article upon which a corresponding stamp tax is now imposed by law, be in lieu of such tax.

* * * * * * *

"Schedule A—Stamp Taxes

* * * * * * *

"3. Capital stock, sales or transfers: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to shares or certificates of stock or of profits or of interest in property or accumula-

tions in any corporation, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not, on each $100 of face value or fraction thereof, 2 cents, and where such shares are without par or face value, the tax shall be 2 cents on the transfer or sale or agreement to sell on each share: Provided, That it is not intended by this title to impose a tax upon an agreement evidencing a deposit of certificates as collateral security for money loaned thereon, which certificates are not actually sold, nor upon the delivery or transfer for such purpose of certificates so deposited, nor upon mere loans of stock nor upon the return of stock so loaned: Provided further, That the tax shall not be imposed upon deliveries or transfers to a broker for sale, nor upon deliveries or transfers by a broker to a customer for whom and upon whose order he has purchased same, but such deliveries or transfers shall be accompanied by a certificate setting forth the facts. * * * "

The important facts are not in dispute. The transactions in question involve a consolidation of the properties and businesses of the two corporations mentioned in the findings with the property and business of the plaintiff, a New Jersey corporation. While the tax in question does not depend upon the question whether a reorganization took place, the facts show that neither transaction was a reorganization of either of the corporations within itself. By separate letters of September 9, 1929, each corporation proposed to the plaintiff that it would "transfer, deliver, and assign all [its] assets, business, and good will, subject to its liabilities" to plaintiff in consideration of the issuance and delivery "to the company or upon its order" of certificates for a specified number of shares of stock of the plaintiff, which certificates it was further proposed should be issued directly to the holders of the common stock of the company making the offer upon the basis therein specified. Each offer, as made, was accepted by plaintiff and the transactions were carried out as agreed.

[fol. 108] Schedule A-3 of section 800 provides, in addition to the tax of five cents a share on an original issue, for a tax of two cents a share on all "transfers of legal title to shares of certificates of stock." It is not questioned that had the Raybestos Company and the United States Asbestos Company received the stock in question and carried out their clearly avowed purpose to distribute such stock by transfers to their stockholders, the payment of a tax of two cents a share here imposed would have been required. We think the liability for such a tax cannot be avoided by an arrangement for the issuance of such stock directly to the stockholders of the selling corporations. The statute imposes a tax upon not only "transfers of legal title to shares of stock" but also upon "other documents, instruments, matters, and things mentioned and described in schedule A", and schedule A requires that the tax be exacted where there has been a transfer of "rights to receive such shares or certificates."

The sole purpose of the section was to raise revenue and its language is very broad. Liability for the payment of the tax is imposed upon the transferor, the transferee, and the corporation whose stock is the subject of the transfer. The language of the section discloses a recognition that if the tax were confined to technical transfers of "legal title to shares" much of the revenue sought to be raised from this source would be lost through arrangements to accomplish the same end by one transaction instead of two. The tax was therefore laid upon the substance of the transaction rather than the form by making transfers of rights to receive such shares the equivalent of an actual transfer thereof. The exemptions allowed are definite and specific, and emphasize the broad purpose of the statute to impose the tax upon transactions such as are involved in this case. This was not a transaction whereby plaintiff acquired the stock of the stockholders of the Raybestos Company and the United States Asbestos Company but it took over the assets of those companies in exchange for its stock. The selling corporations were the ones who had the right to receive the consideration (stock) for their assets and business sold to plaintiff and these corporations, when they transferred their assets to plaintiff, directed that the stock of the plaintiff be delivered "to the company or upon its order." They directed that the stock of plaintiff to be

issued in exchange for the assets and business be issued and delivered to their stockholders. This, we think, was clearly a transfer of legal title to the shares and the transfer of their rights to receive such shares within the meaning of the statute in question. This was the substance of the transaction although it took the form of a direct issuance of the stock to the stockholders of the selling corporations. Plaintiff has cited a number of decisions in support of its argument that the tax was illegally exacted, which we have considered, but we think they are not controlling here and, therefore, we deem it unnecessary to discuss them in detail. It is also contended that the proceedings resulting in the formation and activities of plaintiff involved no sale or transfer of legal title to shares or certificates of stock, that merely the evidences of legal title to capital interests, or to shares not actually sold but retained by their owners, entered into the transaction, and they required exchanging of certificates to disclose properly the capital interest of each share-owner after the mer- [fol. 109] ger of separate business into a single enterprise; that the right to receive the certificates of plaintiff's no-par-value shares evidencing the individual capital interests when merged, given in replacement of certificates evidencing the same capital interests before the merger, belonged to the owners of such capital interests, the individual stockholders, and to assume otherwise is to recognize shadow or semblance for substance or reality. We think, however, that there was an outright purchase by plaintiff of the business and assets of the two corporations mentioned and that such corporations were the ones legally entitled to receive plaintiff's shares in the transaction, and that, in substance, there was a transfer by them of their right to receive such shares to their stockholders. United States v. Brown Fence & Wire Co. (D. C. Northern Dist. Ohio), January 31, 1935; C. C. H. Tax Service, vol. 3, par. 9144; P.-H Tax Service, vol. 1, par. 869. Since the statute lays the tax upon the substance of the transaction, we are of opinion that the Commissioner correctly exacted the payment of the documentary stamp tax of two cents a share in question.

The petition must be dismissed and it is so ordered.

WHALEY, Judge; WILLIAMS, Judge; GREEN, Judge; and BOOTH, Chief Justice, concur.

[fol. 110] V. JUDGMENT

At a Court of Claims held in the City of Washington on the 4th day of March, A. D., 1935, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judggment herein, the court decides, as a conclusion of law, that plaintiff is not entitled to recover.

It is therefore ordered and adjudged that the plaintiff's petition be and the same is hereby dismissed.

[fol. 111] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 112] EXHIBIT "H"

September 9, 1929.

I certify that the attached is Exhibit "H", referred to in Finding 7, and made a part thereof by reference.

Test:

F. C. Kleinschmidt, Assistant Clerk Court of Claims.

Raybestos-Manhattan, Inc., 61 Willett Street, Passaic, New Jersey.

DEAR SIRS:

We set forth herein the agreement between you and the undersigned, The Raybestos Company(hereinafter sometimes termed the "Company"), with respect to the sale by the Company, pursuant to the Plan of Reorganization attached hereto as Exhibit A, to you, of the assets, business and goodwill (except the corporate franchise) of the Company, subject to its liabilities (and the assets, business and good will of any or all of its subsidiary corporations if requested by you, subject to their liabilities), both tangible and intangible, as constituted at the time of the closing hereunder, in exchange for shares of your stock to be distributed to the stockholders of the Company pursuant to the said Plan.

1. Capitalization of Raybestos-Manhattan, Inc.

It is understood that your corporation is duly organized and existing and in good standing under the laws of the State of New Jersey and has a duly authorized capital stock consisting of 1,000,000 shares of Common Stock without par value, of which 631,012 shares are to be issued in connection with the acquisition by your corporation of the assets, business and good will of the Company and of United States Asbestos Company, a Pennsylvania corporation, and the merger of The Manhattan Rubber Manufacturing Com- [fol. 113] pany, a New Jersey corporation, into your corporation, and 45,000 shares are to be sold for cash. You have entered or are about to enter into the following contracts:

(a) A contract with said United States Asbestos Company providing for the transfer to you of all its assets, subject to its liabilities:

(b) An agreement of Merger and Consolidation with said The Manhattan Rubber Manufacturing Company;

(c) A contract with Hayden, Stone & Co., Hemphill Noyes & Co., and The Equitable Trust Co. of New York, providing for the sale to them of 45,000 shares of your Common Stock.

2. Organization and Condition of the company and its subsidiaries. The Company is duly organized and existing and in good standing under the laws of the State of Connecticut. A statement with respect to the organization and condition of the Company and its subsidiaries is attached hereto as Exhibit B and shall be deemed representations and warranties by the undersigned hereunder.

3. Transfer of assets and business of the company and its subsidiaries. At the closing hereunder and pursuant to the Plan:

The Company will transfer, deliver and assign to you all the assets, business, and good will of the Company, as the same shall exist at the date of such closing, subject to its liabilities, including but without limiting the generality of the foregoing, (a) the good will of said business and the

exclusive right to use the name "Raybestos" or "The Raybestos Company" or any similar name or names to the full extent possessed by the Company, and (b) all of the out-
[fol. 114] standing capital stock of its subsidiary corporations (hereinafter sometimes called its "subsidiaries") named in Exhibit B hereto annexed, or, if so requested in writing by you, all the assets, business and good will of such of said subsidiary corporations as shall be designated in such request subject to their liabilities.

In exchange therefor, pursuant to said plan, (a) you will deliver to the Company or upon its order certificates for 267,012 shares of your Common Stock without par value, which certificates will be delivered for account of and will represent shares of such stock issued directly to the holders of common stock of the Company, pursuant to said Plan, on the basis of two and one-fourth shares of your Common Stock for each share of the Company's common stock held by each such stockholder and you will issue, in lieu of any fraction of a share of your Common Stock issuable to any stockholder of the Company, non-voting and non-dividend bearing Common Stock Scrip, exchangeable in amounts calling for one or more full shares for a certificate for such share or shares; provided that, if any stockholder of the Company whose stock shall not be voted in favor of such sale shall demand payment for his stock, you will in lieu of the delivery to the Company of the certificate for your Common Stock and Common Stock Scrip issuable to such stockholder on the basis above stated, pay to the Company for distribution to such stockholder pursuant to the Plan such sum in cash as in accordance with the laws of Connecticut shall be payable to him on account of his stock of the Company, such payment to be made forthwith upon the determination of its amount; and (b) by appropriate instruments, you will assume all of the liabilities, contracts,
[fol. 115] commitments and other obligations of the Company (and of those subsidiaries of the Company whose assets, business and good will shall be acquired by you as above provided) which shall exist at the date of the closing hereunder, each consideration to be received by you hereunder for your stock to be issued as herein provided, only $—— is contributed as capital and the remainder is contributed as surplus to be used for such purposes, including the payment of dividends as you may determine.

4. Amendment of certificate of incorporation. Prior to or immediately after the completion of the transfer and conveyance of the property of the Company and/or such subsidiaries as shall have been designated by you in the manner provided in paragraph 3 hereof, the Company's Certificate of Incorporation will be amended so as to provide that the duration of the corporation shall be limited to a date which shall be the date of, or immediately following, the date of such transfer and conveyance and the Company thereupon will cease all business activities of every kind and take all necessary steps (a) to make the names "Raybestos" and "The Raybestos Company" and the names of, and trade names used by, the Companay's subsidiaries, and all parts and combinations thereof, available for use by you, your successors and assigns, to the full extent to which the use of such names is available to the Company and/or its subsidiaries, in such manner as you may elect.

[fol. 116] 5. Insurance. The Company, from the date hereof until the closing hereunder, will maintain full and adequate insurance in responsible stock or mutual insurance companies, upon all the tangible assets of the Company and its subsidiaries, against loss by fire, flood, tornado, explosion, accident or other casualty, so far as ordinary forms of insurance may be procured against such losses, as well as public liability coverage of $20,000/$40,000 limits.

6. Corporate proceedings and orders. The Company, whenever requested by you, will forthwith take, and will cause such of its subsidiaries as shall have been designated by you in the manner provided in paragraph 3 hereof, to take all corporate proceedings required to authorize or approve the execution and delivery of all instruments, documents, agreements, certificates, letters, orders, insurance contracts, and papers (hereinafter collectively termed "Instruments of Transfer") which are to be executed and delivered in connection with the transfer contemplated by this agreement and in connection with the dissolution of the Company and/or of its subsidiaries, and will deliver any orders to the depositaries of cash of the Company and/or its subsidiaries, which you may request, to facilitate the prompt transfer on the day of the closing of any accounts with such depositaries.

7. Closing. (a) The closing hereunder shall take place at 61 Willett Street, Passaic, New Jersey, and shall take [fol. 117] place not later than October 15, 1929, at such time as shall be specified by written or telegraphic notice from you to the Company, such notice to be given not later than three days before the day so fixed for the closing.

(b) At the closing hereunder the Company will cause to be delivered to you (i) all deeds, assignments, bills of sale and other instruments (in form mutually satisfactory to counsel for the Company and you) necessary to effect the full and complete transfer and conveyance to you of the property of the Company and, if so requested as above provided, in lieu of the stock thereof, the property of any or all of its subsidiary corporations and (ii) all contracts for insurance referred to in paragraph 5 hereof duly assigned so as to insure your interest with respect to such property as you may request; and the Company will deliver to each bank or trust company which is a depositary for its cash, instructions to hold all cash of the Company deposited with it for your account, provision to be made for checks of the Company delivered prior to the day of closing, and will cause similar instructions to be delivered by those of its subsidiaries, if any, whose assets are to be transferred as herein provided; and simultaneously therewith you will deliver to the Company or on its order the number of shares of its Common Stock above specified.

[fol. 118] (c) All instruments of transfer and conveyance so to be delivered by the Company at the closing shall contain covenants obligating the Company and/or its subsidiaries, at your request and expense, at any time from time to time to execute and deliver such further instruments of conveyance and transfer as you may reasonably require for the purpose more effectively of conveying and transferring to you any of the said property of the Company and/or its subsidiaries and to assist in the collection or reduction to possession of any of such property and in the defense of any suit or other proceedings against you which shall arise in whole or in part out of any matter or things which occurred prior to the closing hereunder. All conveyances of real estate shall be by warranty deed. To the extent necessary to facilitate the recordation or filing of any such instrument of conveyance or transfer, the Company will cause

to be executed, acknowledged and delivered separate instruments of conveyance or transfer.

(d) Simultaneously with the transfer and conveyance herein provided for, you will be let into full possession and enjoyment of the property of the Company and/or its subsidiaries provided to be transferred hereunder, provided, however, that the Company shall have reasonable access to the records of the Company and/or its subsidiaries delivered to you.

8. Information to be furnished and facilities for investigation to be afforded the purchaser. At the time of closing [fol. 119] hereunder the Company will furnish to you without expense to you the information set forth in Exhibit C hereto attached. Any information contained in this agreement or any exhibit attached hereto may be used in combination with similar information regarding other corporations in connection with the sale of your stock and the formation of purchase, selling and other groups and syndicates and any public offering of such stocks.

9. Bulk sales laws. Prior to the closing hereunder and to the extent requested by you, the Company, at its expense, will comply with the provisions of the so-called Bulk Sales Law of each state in which the Company and/or its subsidiaries is authorized to do business.

10. Expenses. All expenses of the Company in connection with this Agreement and the transfer and conveyance contemplated hereby, shall be borne by you. You will also pay all fees and expenses of the auditors, appraisers, counsel and/or other agents employed by you.

11. Performance. Any obligation or liability hereunder on your part is subject to the conditions precedent set forth in Exhibit D hereto attached, any of which may be waived by you.

Any obligation of the Company to transfer to you its assets, business and good will or the assets, business and good [fol. 120] will of any of its subsidiaries is conditioned upon

(a) your acquiring, at the time of such transfer, or furnishing to the Board of Directors of the Company, evidence satisfactory to it, that within one week from the date of closing you will acquire all the assets, business and good

will of United States Asbestos Company, a Pennsylvania corporation, and of The Manhattan Rubber Manufacturing Company, a New Jersey corporation, subject to their liabilities, and

(b) the business of said United States Asbestos Company and said The Manhattan Rubber Manufacturing Company having been carried on since May 14, 1929, in the ordinary course and no unusual liability or commitment having been incurred by such companies since that date, and no distribution having been made since that date to stockholders of such companies other than dividends at the rates established prior thereto and other than the redemption of the Preferred Stock of United States Asbestos Company.

12. Notices. All notices to be given to you hereunder shall be given by delivering, mailing or telegraphing the same addressed to you at 61 Willett Street, Passaic, New Jersey. All notices to be given to the Company hereunder shall be given by delivering, mailing, or telegraphing the same to the Company at Bridgeport, Connecticut. The time of the giving of any such notice shall be deemed to be the time when such notice is so delivered, mailed, or telegraphed, as the case may be.

[fol. 121] This agreement shall enure to the benefit of and be binding upon the respective legal representatives, successors and assigns of your corporation and of the undersigned.

Kindly indicate your acceptance of this agreement by signing in the space provided below.

Very truly yours, The Raybestos Company, by S. Simpson, President. Attest: Geo. W. Hudson, Secretary.

Accepted:

Raybestos-Manhattan, Inc., by H. M. Green, Vice-President. Attest: Morton F. Judd, Secretary.

[fol. 122] EXHIBIT "A" TO AGREEMENT

Plan

It is proposed that all of the business and assets of The Raybestos Company, a Connecticut corporation (herein

called "the Raybestos Company"), The Manhattan Rubber Manufacturing Company, a New Jersey corporation (herein called "the Manhattan Company") and United States Asbestos Company, a Pennsylvania corporation (herein called "the United States Company") shall be acquired directly or indirectly, by purchase, merger, consolidation, or otherwise, by a corporation (herein called "the New Company"), the New Company to assume all of the liabilities and obligations of the Raybestos Company, the Manhattan Company and the United States Company.

The New Company shall have an authorized capital of 1,000,000 shares of common stock, without par value, and may be a new corporation organized under the laws of any state selected by the Committee constituted by the Agreement annexed hereto or, at the election of such Committee, the New Company may be any one of the above-named companies with appropriate change of its present capital structure and charter.

[fol. 123] The stockholders of the above-named companies are to receive stock of the New Company on the following basis:

2¼ shares of common stock of the New Company for each share of common stock of the Raybestos Company.

1¼ shares of common stock of the New Company for each share of stock of the Manhattan Company.

1 14/100 shares of common stock of the New Company for each share of common stock of the United States Company.

In lieu of any fraction of a share of common stock of the New Company deliverable to any stockholder of any of the above-named companies, there will be issued non-voting and non-dividend bearing common stock scrip, exchangeable, in amounts calling for one or more full shares, for a certificate for such share or shares.

On the above basis there will be required for distribution to the common stockholders of the Raybestos Company, the Manhattan Company and the United States Company an aggregate of 631,012 shares of common stock of the New Company. The New Company will sell a further 45,000 shares of such stock for cash to provide additional capital.

[fol. 124] If any holder of shares of the common stock of The Raybestos Company whose stock shall not have

been voted in favor of this Plan shall demand payment for his shares in accordance with the laws of Connecticut, the New Company will pay to Raybestos (in lieu of the delivery of the shares of its stock otherwise issuable to such stockholder) the sum which such stockholder shall be entitled to be paid for his stock under the laws of Connecticut.

[fol. 125] EXHIBIT "B" TO AGREEMENT

(See Paragraph 2)

Representations and Warranties With Respect to the Organization and Condition of the Company and its Subsidiaries

(a) Capitalization. The Company has a duly authorized and issued and outstanding capital stock as follows:

	Authorized.	Issued and outstanding.
Common Stock (par value $25 per share)	200,000	118,672 shares
Preferred Stock (par value $100 per share)	30,000 shares	None

All of such issued and outstanding capital stock is fully paid and non-assessable.

Of the 30,000 shares authorized as above stated a total of —— shares were issued. On July 1, 1929, all the shares of Preferred Stock then remaining outstanding were redeemed.

Copies of the following instruments, correct and complete as of the date of the agreement to which this Exhibit is attached, have been delivered to Raybestos, namely:

1. Certificate of Incorporation of the Company and all amendments thereto, certified by the proper state official; and

2. By-Laws of the Company and all amendments thereto, certified by the Secretary of the Company.

No change will be made in the authorized or outstanding [fol. 126] capital stock of the Company or in its Certificate of Incorporation or By-Laws prior to the closing under the agreement to which this Exhibit is attached, without the prior written approval of Raybestos-Manhattan, Inc.

(b) Financial Condition. Attached to this Exhibit B as Schedule 1 is a consolidated balance sheet of the Company and its subsidiaries as at —— —, 1929; such balance sheet is complete and correct and discloses all liabilities and obligations of the Company and its subsidiaries whether actual, accrued, contingent or otherwise as at the dates thereof.

Since —— —, 1929, no distribution to stockholders of the Company has been made and no record of stockholders of the Company for the purpose of such a distribution has been taken, except that cash dividends amounting to $—— have been paid on the Common Stock and $—— on the Preferred Stock of the Company and such Preferred Stock has been redeemed, and prior to the closing under the agreement to which this Exhibit is attached no such distribution will be made or record taken.

Since —— —, 1929, no bonus or other special or increased compensation has been paid or awarded to any officer or employee of the Company, and prior to the closing under the agreement to which this Exhibit is attached, no such bonus or other special or increased compensation will be paid or awarded.

[fol. 127] Since —— —, 1929, the affairs and business of the Company have been conducted in the ordinary course of business (except that its Preferred Stock has been redeemed), and prior to the closing under such agreement to which this Exhibit is attached, the affairs and business of the Company will be conducted in the ordinary course of business.

Such changes as have occurred in the financial condition of the Company since —— —, 1929, (except the redemption of all the outstanding Preferred Stock of the Company on July 1, 1929), have been in the ordinary course of business, and prior to the closing hereunder there will be no other change in the assets or liabilities of the Company as shown on the attached balance sheet as at —— —, 1929, except in the ordinary course of business.

There is no litigation or governmental investigation pending or threatened against the Company or any of its subsidiaries nor any reasonable basis therefor known to the Company.

(c) Earnings. The consolidated net earnings of the Company and its subsidiaries after all deductions, for the years

ended December 31, 1926, December 31, 1927, and December 31, 1928, respectively, have been as follows:

[fol. 128] Year ended December 31, 1926.....$
Year ended December 31, 1927.....$
Year ended December 31, 1928.....$

(d) Contracts and Commitments. The Company and its subsidiaries have no contracts extending beyond one year from the date hereof and no unusual contracts or unusual commitments for services, materials or otherwise.

(e) Personal Property and Accounts Receivable. The Company and its subsidiaries now own, and at the time of the closing hereunder will own outright all personal property and accounts receivable reflected on the balance-sheet dated as of —— —, 1929, attached to this Exhibit as Schedule 1, and all accounts receivable arising in the interval between the date of said balance sheet and the date of the closing under the agreement to which this Exhibit is attached, except such as have or shall have been disposed of or liquidated since the date of said balance sheet in the ordinary course of business; and all such personal property and accounts receivable are now, and at the time of the closing hereunder will be, free and clear of all pledges, liens, chattel mortgages, conditional sale agreements and other encumbrances whatsoever, except liens securing liabilities reflected in such balance sheet.

(f) Real Estate. The Company now has, and at the time of the closing hereunder will have, good and marketable [fol. 129] title in fee simple to its factory sites at Bridgeport and Stratford, Connecticut, and to all the real estate which is reflected on the balance sheet attached to this Exhibit as Schedule 1, free and clear of all mortgages, liens or encumbrances whatsoever. At the time of closing under the agreement to which this Exhibit B is attached, all buildings constituting part of such real estate will be in the condition which they were in on —— —, 1929, ordinary wear and tear excepted and except for the occurrence of any fire, flood, explosion, accident or other casualty.

The Company now holds and at the time of closing hereunder will hold a good and valid lease (a copy of which has been exhibited to Raybestos-Manhattan, Inc.) from The Stanley Works, a Connecticut corporation, for a term of five years from the 1st day of July, 1928, at an annual

rental of $4,200 per year, of certain premises described in said lease and adjoining the Bridgeport factory of the Company on the north.

(g) Subsidiaries. The Company now owns and at the time of the closing hereunder will own all the issued and outstanding capital stock, consisting of 675 shares of the par value of $100 per share, of The Canadian Raybestos Company Limited (a Canadian corporation) and all the issued and outstanding capital stock, consisting of 15,000 [fol. 130] shares of the par value of $100 per share, of General Asbestos & Rubber Company (a South Carolina corporation).

The Canadian Raybestos Company Limited is engaged in the manufacture and sale of Asbestos products in Canada. General Asbestos & Rubber Company manufactures chiefly asbestos yarn and cloth and sells these products together with other asbestos products to or through the Company.

[fol. 131] EXHIBIT "C" TO AGREEMENT

(See Paragraph 8)

Information to be Furnished Raybestos-Manhattan by the Company at the Closing

(a) A certificate, satisfactory to the purchaser, by the President and Treasurer of the Company stating that since —— —, 1929, the business of the Company had been conducted in ordinary course, and that no unusual expenditures or disbursements have been made (except for the redemption of the Company's Preferred Stock);

(b) An opinion of counsel, satisfactory to Raybestos-Manhattan, Inc. to the effect that all corporate and other proceedings have been duly taken by the Company and/or its subsidiaries to authorize and approve the transfer and conveyance contemplated by the agreement to which this Exhibit is attached and that Raybestos-Manhattan, Inc. upon such transfer and conveyance will receive good and marketable title to the real estate reflected on the balance sheet attached to Exhibit B as Schedule 1, and to all other assets of the Company.

(c) Copies of all notices to and resolutions of the Board of Directors and Stockholders of the Company and/or its subsidiaries relating to the ratification of the agreement to which this Exhibit is attached, and the approval of the transfer contemplated by such agreement, certified by the Secretaries of the Company and/or its subsidiaries.

[fol. 132] (d) List of stockholders of the Company as shown by the stock books of the Company, showing the number of shares held by each, their respective record addresses as at the date of closing under the Reorganization Agreement to which this Exhibit is attached and which shares held by each such stockholder were voted for or against the Company's entering into such Reorganization Agreement and the sale and transfer of its assets as there contemplated, certified by the transfer agent of the Company.

[fol. 133] EXHIBIT "D" TO AGREEMENT

(See Paragraph II)

Conditions Precedent to Liability of Raybestos-Manhattan, Inc., Under the Agreement to Which This Exhibit is Attached

Any obligation or liability under the agreement to which this Exhibit is attached, on the part of Raybestos-Manhattan, Inc. is subject to the following conditions precedent, any of which may be waived by Raybestos-Manhattan, Inc.:

(1) the correctness and fulfillment at the time of closing under such agreement of all representations and warranties made by the Company under such agreement;

(2) the performance of, and compliance with, all agreements and conditions contained in such agreement to be performed, or complied with, on the part of the Company at or prior to the time of closing under such agreement;

(3) the completion, and approval by counsel for Raybestos-Manhattan, Inc., of all corporate and other proceedings which such counsel may reasonably require of the Company and/or its subsidiaries in order that the transfer and conveyance contemplated by such agreement validly may be made;

(4) the receipt by Raybestos-Manhattan, Inc., of the instruments and papers referred to in Exhibit C of the agreement to which this Exhibit is attached.

[fol. 134] EXHIBIT "I"

Treasury Department,

Internal Revenue Service,

Accounts and Collections

E. L. Swift, Supervisor of Accounts and Collections.

Room 636, Custom House,
New York, N. Y., October 13, 1932.

Raybestos-Manhattan, Inc.,
61 Willett Street, Passaic, New Jersey.

GENTLEMEN:

One of the revenue agents operating under my supervision has just completed an investigation concerning the acquisition by your company of the assets of The Raybestos Company and the United States Asbestos Company.

There were issued as the consideration for the assets acquired 381,012 shares of your common no par value stock, as follows:

The Raybestos Company	267,012	shares
United States Asbestos Company	114,000	"
Total	381,012	"

which shares were issued direct to the individual shareholders of the vendor corporations.

In view of these shares of stock having been issued direct to the individual shareholders of the vendor corporation, rather than to the corporations having the right to receive this stock, there has been a transfer of a right to receive, and liability to transfer tax of 2¢ per share has been incurred under Schedule A-3 of Section 800 of the Revenue Act of 1926, on the number of shares so issued, namely 381,012 shares, the tax amounting to $7,620.24.

As the Chase National Bank, New York City, is the transfer agent of your stock, will you kindly forward your certified check to this institution, or otherwise arrange for the purchase of the necessary revenue stamps to be properly affixed and cancelled under the supervision of this office, at the same time advising this office when you have made the necessary arrangements. Your prompt attention to this matter is requested.

Yours sincerely, (Signed) E. L. Swift, Supervisor in Charge.

No. 42580

RAYBESTOS-MANHATTAN, INC.

vs.

THE UNITED STATES

I certify that the attached is Exhibit "I", referred to in Finding 9, and made a part thereof by reference.

Test:

F. C. Kleinschmidt, Assistant Clerk, Court of Claims.

(Seal.)

Endorsed on cover: File No. 39,478. Court of Claims. Term No. 850. Raybestos-Manhattan, Inc., petitioner, vs. The United States. Petition for a writ of certiorari and exhibit thereto. Filed April 6, 1935. File No. 850 O. T. 1934.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 20, 1935

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED
APR 6 1935
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. [redacted] 20

RAYBESTOS-MANHATTAN, INC.,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

CHARLES H. LEFEVRE,
HOWARD S. LEROY,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 850

RAYBESTOS-MANHATTAN, INC.,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of the Raybestos-Manhattan, Inc., respectfully shows to this Honorable Court:

Summary Statement of the Matter Involved.

The matter here involved is a determination as to whether or not, under the findings of fact in the case, your petitioner was rightly and legally assessed by the Treasury Department, Internal Revenue Service, with a stamp tax on sales or transfers of its capital stock under the provisions of Schedule A-3 of Section 800 of the Revenue Act of 1926 (44 Stat. 99, 100). Such a tax, in the sum of $7,620.24, was demanded of your petitioner on February 3, 1933, under notice to pay the same within ten days thereafter or to suffer the penalty by law provided (Exhibit E). Promptly after your petitioner paid on May 8, 1933, the

sum assessed, with $165.11 as interest thereon, under protest, it filed with the collector where the assessment was made and the tax so paid a claim for the refund of said sum and interest on the grounds that same had been illegally collected (Exhibit F). The Commissioner of Internal Revenue held that the tax was legally collected and rejected the claim (Exhibit G). The contentions of the parties were then carried to the Court of Claims of the United States (Suit No. 42580, filed January 9, 1934) and the judgment of that court, rendered March 4, 1935, upon special findings of fact made a part thereof, was the dismissal of the petition to that court, said court holding, as a conclusion of law, that your petitioner, the plaintiff therein, is not entitled to recover. A duly certified transcript of the record in said court accompanies this petition.

Your petitioner was created and organized in the year 1929, under the corporation laws of the State of New Jersey, for certain definite and specific purposes, as agreed to by all parties having any interest in businesses conducted by and property belonging to three business competitors, corporations, each organized and existing under the laws of a separate State, to-wit, for the following purposes: To acquire all of the business and assets and to assume all of the liabilities and obligations of each of said three corporations and thenceforth to handle the same for the ultimate benefit of the stockholders, or the persons then having capital invested in them, each such person, or stockholders, continuing to have in all matters so handled by your petitioner the same investment in dollars that he had in the part thereof formerly handled by one of the three corporations.

The plan for consolidating (Exhibits A, B, C, and D) said several interests, under a continuation of the then capital stock investments, through an exchange of your petitioner's original issue of capital stock, having then an

estimated and agreed-upon value equal to the estimated and agreed-upon value of the then combined outstanding stock of the said three corporations, for such outstanding stock, whereby the stockholders of the said three corporations were to cease to be such stockholders and at the same time were to become and be the original stockholders of your petitioner, was duly consummated.

The method by which your petitioner acquired the entire business and assets of one of said three corporations, of the Manhattan Rubber Manufacturing Company, a New Jersey corporation, subject to its liabilities and obligations, was a statutory merger (Special Findings of Fact 6).

The method by which your petitioner acquired the entire business and assets of the remaining corporations, of Raybestos Company, a Connecticut corporation, and of United States Asbestos Company, a Pennsylvania corporation, subject to their liabilities and obligations, was by proper deeds, assignments, etc., duly executed and delivered by said corporations (Special Findings of Fact 7 and 8).

Said tax, in the sum of $7,620.24, was assessed upon 381,012 shares of your petitioner's shares of capital stock issued direct by your petitioner to stockholders of Raybestos Company and United States Asbestos Company, and delivered in exchange for their shares in said companies, as the Commissioner of Internal Revenue treated said 381,012 shares as the consideration for the assets your petitioner acquired from said companies.

The Court of Claims decided that the transaction of consolidating the corporations, under the plan hereinbefore mentioned, was not a transaction whereby your petitioner acquired the stock of the stockholders of the Raybestos Company and the United States Asbestos Company, but a transaction whereby your petitioner took over the assets of those companies, in exchange for your petitioner's stock, and, accordingly, that there was such a transfer of said

companies' rights to receive your petitioner's shares as to make your petitioner liable for the payment of said tax.

Your petitioner still maintaining and contending that the said tax was illegally collected under the facts and circumstances of the case, because, in the first place, the consolidating corporations had no right to receive their own issued and outstanding shares of stock from the *bona fide* owners of said shares without such owners giving them the right, which they did not do, and because, in the second place, the consolidating corporations had no right to receive shares of stock given in exchange for such issued and outstanding shares without the *bona fide* owners of the latter giving them that right, which they did not do, your petitioner desires this Honorable Court to review the decision and judgment of the Court of Claims, this Court, in the case of *Gould* v. *Gould*, 245 U. S. 151, having said:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen."

Reasons Relied On for the Allowance of the Writ.

1. The case of *Marconi Wireless Telegraph Co. of America* v. *Duffy*, decided May 31, 1921, by the District Court of the United States for the District of New Jersey, and reported in 273 Fed. 197, holds that when property of one corporation is sold to another corporation for stock of the vendee corporation, and the latter is credited for such of its stock as it issued to such stockholders of the vendor corporation as desired to receive same for surrendered certificates of stock in the vendor corporation, as though the shares had been issued directly to the vendor, a sale or

transfer stamp tax would properly attach and be collectible, because an actual transfer of the vendor's rights to receive the vendee's shares was involved in the transaction, yet said court makes reference in its opinion to a different conclusion reached in the case of *McClain* v. *Fleshmann*, 106 Fed. 880, 46 C. C. A. 15, wherein the settlements involved did not include agreements for a resale of stock nor conditions under which an agreement to that effect could be inferred for the purpose of extending the provisions of the Revenue Act, so as to justify application of sales or transfers stamp tax in addition to the applicable original issue stamp tax.

2. The case of *Minnesota Mining & Manufacturing Co.* v. *Willcuts*, decided August 15, 1932, by the District Court for the District of Minnesota, and reported in 2 F. Supp. 789, holds that no stamp tax liability on "sales or transfers" of stock results to a Minnesota corporation from the issue to its stockholders by a Delaware corporation of shares of the latter, share for share, upon the surrender by the stockholders of their shares in the Minnesota Corporation pursuant to a plan agreed to by the stockholders and contemplating (1) the organization of the Delaware corporation, (2) the transfer of all the assets of the Minnesota corporation to the new corporation, (3) as between the two corporations a proper agreement as to the consideration supporting such transfer, and (4) the protection of the individual rights of the various stockholders in the Minnesota corporation, so that on carrying out the plan each such stockholder would be as well off, financially, as he was before.

3. The case of *Shreveport-El Dorado Pipe Line Co.* v. *McGrawl*, decided February 11, 1933, by the Circuit Court of Appeals, Fifth Circuit, and reported in 63 F. (2d) 202, holds that a documentary stamp tax assessed under said Schedule A-3, Act of 1926, is not applicable to sales or trans-

fers of capital stock when the acts or transactions involved effect a change of corporate dress but do not effect a change of ownership in the stock, or interest dealt with, or when a new company is formed to take over the entire assets, properties, and franchises of an old company and to give to the stockholders of the old company shares of the new in lieu of cancelled shares of the old.

4. The case of *Westmoreland Coal* v. *MacLaughlin*, decided March 23, 1934, by the District Court for Eastern Pennsylvania, and reported in 8 F. Supp. 963, holds that where assets of a Pennsylvania corporation in consideration of issuance of total authorized capital stock of a Delaware corporation to stockholders of the Pennsylvania corporation, and the stock is issued direct to such stockholders under the controlling agreement, the transactions do not involve liability for a stamp tax on a theory of an implied transfer of a right to receive shares.

5. The case of *Consolidated Equities, Inc.*, v. *White*, decided July 17, 1934, by the District Court of Massachusetts, and reported in 7 F. Supp. 851, holds that where a broker sold voting trust certificates, representing shares in investment corporation and customer sent purchase price to broker who paid it to corporation, whereupon corporation issued shares to voting trustees who instructed transfer agent to issue to purchaser voting trust certificates, stamp tax on alleged transfer of shares is unlawfully exacted, since customer purchased only beneficial interest in stock and not legal title therein.

6. The case of *United States* v. *Brown Fence & Wire Co.*, decided January 31, 1935, by the District Court for the Northern District of Ohio, and not yet officially reported, but the only case cited in the Court of Claims' opinion, is in apparent contradiction to the positions held in some of the cases hereinbefore mentioned, yet in reality it adds little, if

anything, new to the crux of the points made in said other opinions. The Court of Claims cites it as supporting the conclusion that there was an outright purchase by your petitioner of the business and assets of the two corporations mentioned and that such corporations were the ones legally entitled to receive your petitioner's shares in the transaction, and that, in substance, there was a transfer by them of their right to receive such shares to their stockholders. While the opinion in the Ohio case does not set forth the facts of the case, the District Court interpreted said facts, whatever they may be, to show that the transactions involved included such a transfer of something from the Ohio company to its stockholders of legal interest, or title, of that company in the stock of the Delaware company sufficient to bring the decision in the case in line with the decision in the *Marconi Wireless Telegraph Company* v. *Duffy* case, *supra*.

7. The perplexing difficulty arising in the cases bearing upon a correct interpretation of the words, "rights to subscribe for or to receive such shares or certificates," as used in said Schedule A-3, is apparently regarding how the legal title to shares or certificates of stock may be recognized in the light of the facts of a particular transaction, and none of the cases dealing directly with that subject has yet been reviewed and clarified by this Honorable Court, while the decisions thereon in the District and the Circuit Courts appear to make a fairly clear distinction between cases where the legal title to the shares or certificates of stock dealt with is, as shown by the facts in the case, in the corporation and cases where the legal title to the shares or certificates of stock dealt with is, as shown by the facts in the case, in the stockholders, as this distinction in the majority of the adjudicated cases is determinative of the question whether or not a sale or transfer of legal title as contemplated by the Act actually occurred in fact or by necessary implication.

8. The Court of Claims predicated its opinion and judgment upon the assumption that the two corporations had the right to receive the 381,012 shares of your petitioner's original stock issue, and, by so assuming, it overlooked the controlling theory of the consolidating transaction, whereby your petitioner took over the property of the corporations under their approval and consent, and with the approval and consent of their stockholders, without changing the *pro rata* value of the financial investments, or interests, of the stockholders in that property.

9. The controlling theory of the consolidating transaction, as originally stated and evidenced, as submitted to both directors and stockholders for approval and sanction, and as ultimately consummated, was that the new stock was to be issued direct to the stockholders of the old corporations, or to the owners and depositors of the shares of the old corporations, upon the consummation of the plan and agreement, and any alternate theory at any time thereafter stated or sanctioned, as to deliver your petitioner's original shares to the corporations or upon their orders, was for procedural advantages and conveniences merely, and same was in no particular ever made use of, as the original controlling plan was carried through to full consummation.

10. The transfers of corporate property from the corporations to your petitioner by proper deeds, assignments, bills of sale, or other instruments duly executed and delivered by the corporations, were made in proper recognition of the ultimate financial interests involved and in proper consideration that your petitioner's original shares be issued direct to the stockholders of the corporations in exchange for their shares in the corporations, as provided for in the plan and agreement, and the conclusion formed by the Court of Claims that your petitioner was a party to a transaction whereby your petitioner took over the assets of the

Raybestos Company and the United States Asbestos Company, instead of your petitioner acquiring the stock of the stockholders of those companies, is not true and correct.

11. The stockholders of the Raybestos Company and the United States Asbestos Company never gave to those companies the right to receive either their shares in those companies or any original shares of your petitioner given in exchange for the shares belonging to said stockholders.

12. The conclusion of law formed by the Court of Claims rests upon a wrong construction of the controlling elements of the case and the judgment based thereon should be reversed.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Claims of the United States, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full, and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 42580, Raybestos-Manhattan, Inc., a Corporation of the State of New Jersey, v. The United States of America, and that the said judgment of the said Court of Claims may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

RAYBESTOS-MANHATTAN, INC.,
By CHARLES H. LEFEVRE,
HOWARD S. LEROY,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

October Term, 1934

No. [redacted] 20

RAYBESTOS-MANHATTAN, INC.,
Petitioner

vs.

THE UNITED STATES

PETITIONER'S BRIEF

For Use Upon Argument or Submission of Case

CHARLES H. LEFEVRE
HOWARD S. LEROY
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

October Term, 1934

No. 850

RAYBESTOS-MANHATTAN, INC.,

Petitioner

vs.

THE UNITED STATES

PETITIONER'S BRIEF

For Use Upon Argument or Submission of Case

OPINION BELOW

The opinion of the court below (R. 76-79) is reported in 10 F. Supp. 130.

ARGUMENT

Petitioner having set forth in its petition, under the caption "Summary Statement of the Matter Involved," the specific claims advanced and the judgment of the court below thereon, and, under the caption "Reasons Relied On for the Allowance of the Writ," a statement of the questions presented and references to cases believed to sustain the Court's jurisdiction, petitioner confines this, its brief for use upon argument or submission of the case, to an argument dealing with the points of fact and of law deemed to have the most important bearing upon the final determination of said questions.

Provisions and Operation of the Law

Schedule A-3 of Section 800 of the Revenue Act of 1926 (44 Stat. 99, 100), pursuant to provisions of which the stamp tax here involved was imposed, deals exclusively with a stamp tax on sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to shares or certificates of stock or of profits or of interest in property or accumulations in any corporation, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation, or by an assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not.

Said Schedule A-3 immediately follows a schedule of the statute imposing a 5 cent per share tax on each original issue of certificates of stock, or of profits, or of interest in property or accumulations, by any corporation, and the clear import of the language used in said Schedule A-3 is that it imposes an additional tax of 2 cents per share whenever and as often as the *legal title* to shares or certificates of stock or of profits or of interest in property or accumulations in such corporation is subsequently dealt with so as to effect an actual sale of or a transfer to another of the owner's legal interest in or to such shares or certificates.

Shares of corporate stock being regarded as property—a species of incorporeal property, consisting of rights in the profits, management, and assets of a cor-

poration—an unrestricted owner of such shares may dispose of his title to them as he pleases. The right of the holder and owner to alienate his title thereto is incidental to his ownership of the shares, upon the ground that such shares are characterized by the same rights or property features as other forms of property.

Certificates of stock, however, are not in a strict technical sense "negotiable instruments." They are nonnegotiable in the sense that a complete transfer of title, good not only between the parties but also against the corporation itself, can be made only with the concurrence of the corporation in pursuance of its charter, governing statute, or operative by-laws. While not negotiable like bills or notes, certificates of stock are so framed and dealt with as to be transferable, when properly indorsed, by mere delivery, and, when the owner desires to sell or transfer his capital interests in a corporation, the indorsement and delivery of his certificates conveys, by estoppel against the corporation, as good a title to the purchaser or transferee as if the certificates were negotiable in the broader sense.

As such certificates are frequently put in negotiable form to permit of some sort of commercial use, without effecting a sale or transfer of the title to the shares, such as to serve as collateral security for a loan, they are often spoken of and treated as quasi negotiable instruments.

Recognizing that such a commercial use of certificates of stock is frequently resorted to without effecting the kind of sale or transfer of legal title intended to be covered by said Schedule A-3, the first

proviso added to the language used in imposing the tax reads, as follows:

> "Provided, That it is not intended by this chapter to impose a tax upon an agreement evidencing a deposit of certificates as collateral security for money loaned thereon, which certificates are not actually sold, nor upon the delivery or transfer for such purpose of certificates so deposited, nor upon mere loans of stock nor upon the return of stock so loaned."

In applying the provisions of said Schedule A-3, it becomes necessary to inquire into the real status of the *legal title* to the shares or certificates and to ascertain whether or not in the particular transaction involved the shares or certificates were dealt with so as to effect a change in the *legal title* by way of an actual sale or a transfer to another within the meaning of the statute.

Legal Title to Shares or Certificates of Stock of the Raybestos Company

The Raybestos Company parted with its legal title to the 118,672 shares of its common stock upon its issuing same for value to those who became the holders and owners of said shares and entitled to participate in dividends, or distributions of surplus profits, of the corporation, and entitled, upon the dissolution of the corporation, to participate in the distribution of the net assets of the corporation. The certificates of stock, full-paid and non-assessable, issued to said stockholders, evidenced the capital interest of each holder in the corporation and in the business it conducted. The legal title to said 118,672 shares at time

of combining the business of the corporation with the businesses of certain other corporations, as hereinafter mentioned, was in the holders and owners of the certificates of stock, and not in The Raybestos Company, as such, and same could not be sold or transferred to another, and the stamp tax under said Schedule A-3 made applicable, through or by the acts of any parties, including The Raybestos Company, other than those of such holders and owners.

The holders of the legal title to said 118,672 shares did not indorse their certificates and deposit same with the Committee or with the Guaranty Trust Company of New York, Trust Department, as Depository, for the purpose of selling or transferring their legal title to the capital interests that the certificates evidenced, but they indorsed and deposited same for the purpose of participating in the consummation of a Plan (R. 12) proposed to combine the business of The Raybestos Company with the businesses of The Manhattan Rubber Manufacturing Company and United States Asbestos Company, with a fair expectation that such a consolidation of the businesses would be advantageous to their said capital interests, by bringing about substantial economies both in manufacturing and selling expenses of the products in which said companies dealt, with each holder of said 118,672 shares receiving 2.25 shares of "the New Company" (RAYBESTOS-MANHATTAN, INC.), formed to acquire all of the assets of the three companies, and to assume all of their obligations and liabilities, in exchange, or replacement, for each share of The Raybestos Company stock, so as to evidence the same capital interest in

dollar value of the holder after the businesses were combined that he had in the business of The Raybestos Company at the time of consolidation; and, if said Plan failed of consummation, he was entitled to the return of his indorsed certificates so deposited (R. 12). The Plan (R. 12) was supported by an "Agreement" between the Committee and the Depositors (R. 14). The letter, dated May 22, 1929, (R. 9) sent out by the president of The Raybestos Company to holders of common stock of that Company, as well as the Plan and the Agreement (R. 9-26), defines how and to what extent the holders of said stock were to participate in the combining of the business of The Raybestos Company with the business of said other companies. They were to participate by having their capital investments in the assets and the business of The Raybestos Company, measured by a dollar value, follow said assets and business from the control and management of The Raybestos Company into the control and management of "the New Company" without their parting with their legal title to their capital investments in the assets and business, without their selling or transferring to another or others their capital interests, evidenced immediately before the movement by 118,672 shares of The Raybestos Company, and evidenced immediately after the movement by 267,012 shares of "the New Company" (RAYBESTOS-MANHATTAN, INC.), without immediate gain or loss in dollar value.

In what manner and to what extent The Raybestos Company participated in the movement of combining its assets and business with the assets and businesses of other companies are matters either collat-

eral or incidental to the manner and extent in which the holders and owners of the capital stock of The Raybestos Company participated in that movement, as what The Raybestos Company, as such, did or omitted to do has no direct bearing upon what the holders of the stock alone could or did do with respect to the legal title to the shares or certificates of stock or of profits or of interest in property or accumulations in The Raybestos Company belonging to said stockholders as their absolute property.

To make the sales or transfers stamp tax applicable, under what actually happened in this case, the United States representatives assessing a stamp tax under said Schedule A-3 in the sum of $7,620.24, as of February 3, 1933 (R. 61), were forced to assume or to imply that something done or omitted to be done by The Raybestos Company effected a sale or transfer to The Raybestos Company, as such, of the legal title to said 267,012 shares, on which a part of said $7,620.24 was assessed (R. 93), notwithstanding that the Plan and the Agreement, as aforesaid, provided that said 267,012 shares were to be issued in replacement of said 118,672 shares, and said 118,672 shares were not owned or held by The Raybestos Company, as such, at any time during the transaction carried into consummation. What in substance happened to the stockholders' interests, dealt with in the particular transaction, was that their capital investments were removed, at their dollar value, from one container or holder and were placed in another and larger container or holder, at said dollar value, where other interests, at their dollar values, were about to be or had been placed, and with which they

commingled without destroying the dollar value of any of the commingled interests, each stockholder of The Raybestos Company and each stockholder of the other companies having after the interests were united in Raybestos-Manhattan, Inc., the same capital investment in dollar value in the commingled property that he had in property while it remained in one or another of the original containers or holders. No stockholder lost or parted with his *legal title* to his capital investment, valued in dollars as of the time of the commingling of capital interests, any more than if that title had been in some corporal commodity, as milk measured in quarts, when combined with other definite quantities of such commodity, would cause him to lose or part with his legal interest in his property. When the respective owners of 2, 3, and 5 quarts of milk pour their milk into a single container, of sufficient capacity to hold 10 quarts, the owners' interests in the mingled milk remain 2, 3, and 5 quarts respectively.

Legal Title to Shares or Certificates of Stock of United States Asbestos Company

What has been said herein with respect to the title to 118,672 shares of the common stock of The Raybestos Company, for which petitioner delivered 267,012 of its shares in replacement, could with equal meaning and propriety be said for like purposes concerning the title to 100,000 shares of the common stock of United States Asbestos Company, for which petitioner delivered 114,000 of its shares in replacement, as the legal title to said 100,000 shares was vested, at the time of combining the businesses of the

three corporations, in individual owners, and not in the United States Asbestos Company, as such, and said owners participated in the combining of the businesses in the same manner and with the same results that the owners of the common stock of The Raybestos Company participated therein.

Legal Title to 381,012 Shares of Raybestos-Manhattan, Inc., Common No Par Value Stock

The original issue of 381,012 shares of Raybestos-Manhattan, Inc., stock delivered pursuant to the Plan and Agreement to stockholders of The Raybestos Company, who received 267,012 of said shares in replacement of their 118,672 shares of The Raybestos Company, and to stockholders of United States Asbestos Company, who received 114,000 of said shares in replacement of their 100,000 shares of United States Asbestos Company, either evidenced or in substance was the very extent to which said stockholders, owning capital interests in the businesses consolidated, participated in the consummation of the Plan without selling or otherwise disposing of their legal title in said interests. The original issue tax of 5 cents per share was paid (R. 75). The additional tax of 2 cents per share (in issue here) was paid under protest (R. 75).

Theory of Court Claims False and Incorrect

The judgment of the Court of Claims of the United States (R. 80) rests upon a theory that your petitioner was a party to a transaction whereby your petitioner took over the assets of The Raybestos Com-

pany and the United States Asbestos Company, instead of your petitioner acquiring the stock of the stockholders of those companies (R. 78), which said theory is false and incorrect in that your petitioner was a party to a transaction whereby your petitioner not only took over said assets but also assumed all the obligations and liabilities of those companies, including the obligations and liabilities of those companies to their stockholders, as all the capital interests of those companies, evidenced by their issued and outstanding certificates of stock at the time of said transaction, participated in said transaction and were of the very essence of said transaction.

Capital Interests in Stockholders

The assets and businesses of those companies, subject to the obligations and liabilities of those companies, excepting only in a restricted technical sense relating to certain rights and property interests given by law to the artificial person created by law for special corporate purposes, were the very capital interests of the stockholders which their certificates of stock evidenced as the property of said stockholders. To ignore the legal title to shares or certificates of stock or of profits or of interest in property or accumulations in any corporation, without the consent of the holders or owners of such shares or certificates, and without an expressed willingness and intent of such holders or owners to divest themselves of their legal title to such shares or certificates to a purchaser or a transferee for value, and to make the original issue of said 381,012 shares of Raybestos-Manhattan, Inc., common no par value stock go to any other party

than to such holders and owners, who participated in the transaction, as aforesaid, in consideration that they would receive said 381,012 shares in replacement of the shares they deposited for purposes of consummating said transaction, would have been acts beyond the very purpose for which Raybestos-Manhattan, Inc., was created and organized, and would have been acts incompatible with the very essence of the transaction consummated.

CONCLUSION

Your petitioner, still maintaining and contending that the said additional 2 cent per share tax was illegally collected, under the facts and circumstances of this case, because, in the first place, the consolidating corporations, as such, had no right to receive their own issued and outstanding shares of stock from the *bona fide* owners of said shares without said owners giving them that right, which they did not do, and because in the second place, the consolidating corporations had no right to receive said 381,012 shares of Raybestos-Manhattan, Inc., common no par value stock given in exchange for or replacement of said issued and outstanding shares without said *bona fide* owners giving them that right, which they did not do, submits that said judgment of said Court of Claims should be reversed by this Honorable Court.

RAYBESTOS-MANHATTAN, INC.,
By CHARLES H. LEFEVRE
HOWARD S. LEROY
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 20.

RAYBESTOS-MANHATTAN, INC., *Petitioner*,

v.

THE UNITED STATES.

On Writ of Certiorari to the Court of Claims.

PETITIONER'S SUPPLEMENTAL BRIEF.

CHARLES H. LEFEVRE,
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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THE OCTOBER TERM, 1935.

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THE UNITED STATES.

On Writ of Certiorari to the Court of Claims.

PETITIONER'S SUPPLEMENTAL BRIEF.

OPINION BELOW.

The opinion of the court below (R. 76-79) is reported in 10 F. Supp. 130.

JURISDICTION.

The judgment of the court below was entered March 4, 1935 (R. 80). The petition for a writ of certiorari was filed April 6, 1935 (R. 94), and was granted May 20, 1935

(R. 94). The jurisdiction of this Court rests on Section 3(b) of the Act of February 13, 1925.

QUESTION PRESENTED.

The question is whether under Section 800, Schedule A-3, of the Revenue Act of 1926 a transfer tax was incurred by petitioner where petitioner had acquired the assets and assumed the liabilities of three corporations in consideration of petitioner issuing shares of petitioner's stock direct to the stockholders of the three corporations.

STATUTE AND REGULATIONS INVOLVED.

The applicable statute and regulations of the Treasury Department are set forth in the Appendix B, *infra*, pages 36-40.

SUMMARY STATEMENT OF THE CASE.

The facts when stripped of detail and summarized are:

In 1929 under a "Plan and Agreement" of reorganization, The Manhattan Rubber Manufacturing Company was merged with and The Raybestos Company and United States Asbestos Companies were consolidated into petitioner, Raybestos-Manhattan, Inc. The three old corporations agreed to transfer their assets together with their liabilities to the new corporation (petitioner) in consideration of the latter issuing its shares directly to the stockholders of the old corporations who agreed to surrender their old stock upon receiving in replacement therefor stock in the new corporation. The issuance tax of 5c per share was paid by petitioner, the new corporation, and is not here in issue.

The Commissioner has held that there was no transfer from the Manhattan Company to its stockholders of the right to receive petitioner's stock, but has held that there was a transfer from The Raybestos Company and the

United States Asbestos Company to their stockholders of the right to receive petitioner's stock. This second tax of 2c per share upon the fiction of alleged transfers of the right to receive petitioner's stock to the stockholders of The Raybestos Company and United States Asbestos Companies, and which petitioner paid, is here in issue.

For the convenience of the Court a more complete summary of the facts is set out in Appendix A, *infra*, pp. 32-35.

SUMMARY OF ARGUMENT.

There is no basis for the imposition of the tax for the reasons that:

(1) The tax is contrary to the Treasury Regulations.

(2) The statute taxes the transfer of "legal title . . . to rights . . . to receive" shares of stock. (a) The imposition of the tax is purported to be justified by the adoption of the fiction of a transfer having occurred. (b) No such transfer actually occurred.

(3) The right to receive the new shares vested in the stockholders from the moment of its inception, and the agreement for the conveyance of the assets negatived any right of the corporations to receive the stock. No transfer of legal title to a right to receive could have been made by corporations which never had that right to persons who enjoyed it from the moment it came into existence.

(4) The stamp transfer tax is an excise tax levied upon the privilege of making a transfer from one person to another. If no privilege be exercised, and no transfer be made, there is nothing to which the tax can attach. No liability can arise without an actual transfer as distinguished from a constructive or implied or hypothetical one.

(5) Cases involving this precise question have held that no tax was possible.

ARGUMENT.

There is no basis for the imposition of the tax.

(1) The tax is contrary to the Treasury Regulations.

Article 35 of Regulation 71 (set out in Appendix B, *infra*, pp. 36-40), in effect in 1929, as pertinent to the issue here, reads as follows:

> Sales and transfers not subject to tax.—The following transactions are not subject to the tax:
>
> * * * * * * * * *
>
> (d) The surrender of the stock of the consolidating corporation in exchange for stock in the consolidated corporation, in the case of consolidation of two or more corporations.
>
> (e) The transfer of the stock of a merged corporation in exchange for stock of the merging corporation at the time and as a part of a statutory merger is not subject to tax, nor is the substitution of new certificates for the certificates representing the old stock of the merging corporation.

The Government abided by the provisions of subsection (e), above, when it refrained from assessing a stamp transfer tax upon petitioner issuing its shares to stockholders of The Manhattan Rubber Manufacturing Company in exchange for their shares in that Company, but, it violated the provisions of subsection (d), above, when it imposed transfer taxes upon petitioner issuing its shares to stockholders of The Raybestos Company and the United States Asbestos Company, respectively, upon surrender of their stock in exchange for stock in the consolidated corporation. The regulation has the force of law and should be followed in this case. Article 35 of Regulations 71 was again promulgated in Article 35 of the 1932 edition of Regulations 71. The pertinent portion of the language of Schedule A-3 of Title VIII of the Revenue Act of 1926 was not changed

when that schedule was amended by section 723(a) of the Revenue Act of 1932, and the controlling provisions of Regulations 71, as above quoted have obtained legislative and administrative approval. *Brewster* v. *Gage*, 280 U. S. 327; *Murphy Oil Co.* v. *Burnet*, 287 U. S. 299; *U. S.* v. *Dakota-Montana Oil Co.*, 288 U. S. 459.

It is to be noted that by the regulations it is the "transaction" that is not subject to the tax on the "surrender of the stock."

(2) The statute taxes the transfer of "legal title . . . . to rights . . . to receive" shares of stock.

(a) The Government purports to justify the imposition of the tax by the adoption of the fiction of a transfer of the kind having occurred.

The original letter from the Treasury Department, dated October 13, 1932 (R. 93), stated:

> "There were issued as the consideration for the assets acquired 381,012 shares of your common no par value stock, as follows:
>
> | | |
> |---|---|
> | The Raybestos Company ..... | 267,012 shares |
> | The United States Asbestos Company | 114,000 |
> | Total ..... | 381,012 |
>
> *which shares were issued direct to the individual shareholders of the vendor corporations.*
>
> "In view of these shares of stock having been issued direct to the individual shareholders of the vendor corporation, *rather than to the corporations having the right to receive this stock*, there has been a transfer of a right to receive, and liability to transfer tax of 2c per share has been incurred under Schedule A-3 of Section 800 of the Revenue Act of 1926, on the number of shares so issued, namely 381,012 shares, the tax amounting to $7,620.24."

The letter of the Commissioner (R. 63) rejecting petitioner's claim for refund stated that (R. 64):

> "This office has uniformly held that in such a case the old corporations have the right to receive the stock issued in consideration for their assets and the issuance of such stock direct to the stockholders involves a transfer on the part of the corporations of their right to receive the stock."

This clearly shows that the Government recognized that the issuance of the stock was direct to the stockholders, but nevertheless contends a transfer of the "right to receive stock." This contention is made in the Brief of the United States filed herein where, on page 7, it states:

> "The well-established principle that the ownership of corporate property is in the corporation and not in the stockholders makes it clear that when the consolidating corporations sold their assets, the corporations and not the stockholders acquired the right to receive the new stock as the consideration, and transferred that right to their stockholders."

At once the false premise of the contention is disclosed. The person entitled to receive the stock is determinable by the contract between the person (a corporation or otherwise, and the stockholders in this instance) controlling the payment of the consideration for, and, the corporation who is to issue, the stock. Yet the Government contends (Brief p. 10):

> "The rule which we contend should be applied in this case is that when A corporation by agreement transfers its assets to B corporation in consideration for the issuance of stock by B to stockholders of A, *the transferor corporation acquires the right to receive the issued shares* which by the agreement it contemporaneously transfers to its stockholders."

That title to corporate property is in the corporation and not its stockholders is clear and admitted but this does not

"make it clear," as contended by the Government nor does it follow necessarily therefrom or at all that when a person (individual, corporation or otherwise) sells his or its assets to a corporation, which corporation, in consideration therefor, agrees to issue its stock, that the issue must necessarily be to the corporation paying the consideration. While it is the usual case that the one who pays the consideration receives the right to the issuance of stock this is not necessarily so. The Department has previously recognized that the person paying the consideration may have no right to receive the stock.

The situation appears to be precisely the same as that presented in the case covered by Office Decision 176, a ruling (by the Sales Tax Division of the Bureau of Internal Revenue) published in October, 1921. The decision in its entirety reads as follows (O. D. 176 S. T. 10-21-320):

> "In addition to other property rights conveyed, A conveyed to the corporation several parcels of real estate which he owned individually. The Corporation was capitalized for $500,000, the same being represented by 5000 shares of no par value stock of which 1000 shares were issued to each of his five children.
>
> "There was no privity of contract between A and his children, and under the terms of the contract which A had with the corporation the stock was in the first instance to be issued to the children. Hence A had at no time any right to receive such stock, and, therefore, could make no taxable transfer of such right."

This ruling was made in 1921. Section 800 of the Act of 1926 was passed five years after the rule of the Department had been thus established. In view of this fact, we refer to *Brewster* v. *Gage*, 280 U. S. 327; *Murphy Oil Co.* v. *Burnet*, 287 U. S. 299; *U. S.* v. *Dakota-Montana Oil Co.*, 288 U. S. 459, holding that the reenactment without change of a statute upon which rulings and regulations are based, is persuasive evidence that those rulings have obtained legislative approval.

No distinction between the case covered by the 1921 Office Decision 176 and the situation in the present case can be predicated upon the fact that there is a difference between the contractual powers of individuals and of corporations. If, however, it be urged that an individual can give away his property but that a corporation cannot do so, the answer is that the constituent companies did not give away their property but they contracted to convey it for a consideration which inured to the benefit of their stockholders.

It makes no difference that the consideration for the issuance of the stock was the transfer of the three old corporations' assets. They had the right to transfer their assets to petitioner for a consideration not moving to them.

The Government is not justified in adopting one fiction rather than another. It is much less justified in adopting any fiction. The Government cites no authority, and indeed there is none, for its proposition that where one corporation delivers assets to a second corporation and the consideration is to be the issuance of the second corporation's stock, that such stock must necessarily be issued to the first corporation. We again respectfully call attention to the principle recognized in Office Decision 176 (*supra*). The fact that the transferor of the property is a corporation rather an individual is immaterial. This principle was recognized in the case of *Westmoreland Coal Co.* v. *MacLaughlin*, 8 Fed. Supp. 963, and others referred to below.

The Raybestos Company and the United States Asbestos Company were parties to the contract with petitioner solely because they held legal title to the assets to be assigned to petitioner. The stockholders of the two corporations were the real parties in interest, and their authorization was a vital prerequisite to the validity of the transaction, for the laws of the State of the incorporation of The Raybestos Company and the United States Asbestos Company, *i. e.*, Connecticut and Pennsylvania, respectively, require the consent of the stockholders to the alienation of all the assets

held by corporations. (Section 3384 of Chapter 191 of The General Corporation Law of Connecticut, General Statutes of Connecticut—Revision of 1930; and sections 302 and 311 of Article III of the Business Corporation Law of Pennsylvania.) The consent of such stockholders did not give the corporations the right to receive the stock of petitioner—they reserved that right to themselves, and hence the two corporations did not at any time possess any right which they could transfer.

b. *No such transfer occurred.*

The Government contends that even if the principle of *Westmoreland Coal Co.* v. *MacLaughlin*, 8 Fed. Supp. 963, is correct, nevertheless, the tax was correctly imposed against petitioner upon the wording and terms of the contract. The Government makes much in its brief (Brief, pp. 14-16) of a few phrases carefully lifted out of the extended letters, plans and agreements used in connection with the consolidation of a $20,000,000 business. An analysis of each particular phrase in its proper setting clearly shows that contrary to the Government's contention the phrases quoted strengthen petitioner's contention that there was no transfer by the old corporations of any rights to receive stock, that the parties contemplated not such a transfer but only an issuance direct to the stockholders of the old corporations.

Petitioner, by the agreement of September 9, 1929 (R. 82), was to

> "deliver to the Company or upon its order certificates for * * * shares * * * which certificates will be delivered for account of and will represent shares of such stock issued directly to the holders of common stock of the Company * * *"

The Government contends (Brief p. 15) that this "states in effect" that the delivery of "petitioner's stock direct to

the stockholders of the consolidating corporations was to be made pursuant to the order of those corporations." The clause quoted states no such thing "in effect" or otherwise. The draftsman of the agreement of September 9, 1929, had in mind the clear difference between a share of stock and the certificate which might evidence it; which difference the Government has apparently overlooked in this matter. It is necessary to quote at length from the paragraph (R. 82) to show with what care the draftsman distinguished between the delivery of the certificates and the issuance of shares of stock:

> "In exchange therefor, pursuant to said plan, (a) you will *deliver* to the Company or upon its order *certificates* for 267,012 shares of your Common Stock without par value, which *certificates will be delivered* for account of and will represent shares of such *stock issued directly to the holders of common stock of the Company,* pursuant to said Plan, on the basis of two and one-fourth shares of your Common Stock for each share of the Company's common stock held by each such stockholder and *you will issue, in lieu of any fraction of a share* of your Common Stock *issuable to any stockholder* of the Company, non-voting and non-dividend bearing *Common Stock Scrip,* exchangeable in amounts calling for one or more full shares for a certificate for such share or shares; provided that, if any stockholder of the Company whose stock shall not be voted in favor of such sales shall demand payment for his stock, you will *in lieu of the delivery* to the Company *of the certificate for* your *Common Stock and Common Stock Scrip issuable to such stockholder* on the basis above stated, pay to the Company for distribution to such stockholder pursuant to the Plan such sum in cash as in accordance with the laws of Connecticut shall be payable to him on account of his stock of the Company, such payment to be made forthwith upon the determination of its amount."

The intention is clear; the new corporation, *i. e.*, the petitioner, is to "deliver * * * certificates" and to "issue * * *

stock." The certificates are to be delivered to the "Company or its order" while the stock is to be issued to the shareholders. The delivery of the certificates to the "company or its order" is clearly, from an understanding of the mechanics of the transaction, a delivery to an escrow holder. The reason is obvious for the employment of the convenient and usual business device of an escrow to effect the delivery of petitioner's stock upon surrender of stock of the old corporations. The disadvantage resulting from any one of the merging corporations obtaining a block of the petitioner's stock equal to perhaps a third of all outstanding stock is likewise obvious; the practical control of the new corporation could be obtained by this means. The provision for persons entitled to fractions of shares and the provisions for non-depositing stockholders evidences the intent of the parties that the stock was to be issued to the stockholders direct and not to the old corporations.

In considering the above it is necessary to keep in mind that the law taxes the transfer of "*legal title* to shares or certificates of stock." Mere *delivery* of a certificate to an escrow holder is not a transfer of legal title.

Even were it conceded that there was some sort of fictitious, assumed, hypothetical or constructive intermediate transfer by the old corporations to their stockholders, which is not the case, such a transfer would not come within the terms of the statute. The law is explicit. It does not comprehend transfers created by legal or bureau fiction. It embraces only transfers of legal title, and none of the corporations ever had legal title to the right to receive the new stock.

Section 800 of the Revenue Act of 1926 imposes a stamp tax "on all sales, or agreements to sell, or memoranda of sale, or deliveries of, or *transfers of legal title* to shares or certificates of stock * * * or *to rights* to subscribe for or *to receive* such shares or certificates."

What are the kinds of transfer upon which the tax is

imposed in the transfer clause of this provision? The phrase "transfers of legal title" governs each of the dependent phrases which follows it; and, therefore, the only grammatical construction of which the transfer clause of Section 800 is susceptible gives three types of taxable transfers:

(1) "Transfers of legal title to shares;"

(2) "Transfers of legal title . . . to rights to subscribe for . . . shares;" and

(3) "Transfers of legal title . . . to rights . . . to receive . . . shares."

There is no suggestion that this case falls within either of the first two classes. If it comes within any, it must come within the third. In this third class, however, we find that there must be not only a transfer of the right to receive but also a transfer of legal title to that right to receive. No theoretical or hypothetical or constructive right will do. In our case the legal right to receive, and the legal title to that right, could not have come into existence until the two old companies made their contract with the new corporation. By that contract the legal right and title was instantly vested in the individual stockholders. There is, therefore, no taxable transfer to them.

The controlling force of the requirement that "legal title" be the subject of the taxable transfer has been recognized in the following cases:

Union Trust Co. v. *Heiner*, 26 F. (2d) 391 (construing Schedule A-3 of the 1921 Act, which remained unchanged through 1926); and also

U. S. Radiator Corporation v. *State*, 208 N. Y. 144, 101 N. E. 783;

International Paper Co. v. *State*, 206 N. Y. S. 57 (construing the New York stamp transfer tax act which is worded similarly to the Federal statute).

* * *

The statutory language with reference to the transfer of legal title to "rights to subscribe for or to receive" shares

was plainly drawn with reference to the current financial and commercial practice, and inserted so as to cover, in addition to "shares or certificates of stock," the transfer of all "rights" thereunto appertaining. It has been customary for corporations, from time to time, in connection with their financing, to issue "rights" to additional securities to be thereafter issued to holders of securities already issued. These rights are generally represented by certificates either in bearer form or transferable in the same way stock certificates are transferable. They are traded in actively on the stock exchanges or otherwise. Obviously, it was these instruments the transfer of legal title to which Congress intended to tax. The law did not intend to tax transactions similar to that in the case at bar. The respondent imputes a significance to the phrase "rights to . . . receive" which is wholly unwarranted by the text of the statute.

(3) The right to receive the new shares vested in the stockholders from the moment of its inception, and the agreement for the conveyance of assets negatived any right of the corporations to receive the stock. No transfer of legal title to a right to receive could have been made by corporations which never had that right to persons who enjoyed it from the moment it came into existence.

The agreement of May 14, 1929, was entered into between The Raybestos Company, The Manhattan Rubber Manufacturing Company and United States Asbestos Company (R. 68). The stockholders of the three corporations were not parties to such agreement between the three old corporations. The agreements dated September 9, 1929 (R. 80) were entered into between the new corporation, on the one hand, and The Raybestos Company and the United States Asbestos Company, on the other hand. The letter from the president of each of the old corporations to the stockholders of their respective corporations disclosed the general nature of the proposed consolidation; enclosed with

it was a copy of the "Plan and Agreement," which was between a committee, on the one hand, and the stockholders who should deposit their stock, on the other hand.

There was thus no privity of contract between the old corporations and their stockholders relating to the stock end of the transaction, and under the terms of the agreement between the old corporations and the acceptance of their offers by the new corporation, the stock was to be issued in the first instance directly to the stockholders. Hence, the old corporations had at no time any right to receive the stock; and, therefore, they could make no taxable transfer of such right. The clause in the agreement of May 14, 1929, between the old corporations, covering the issuance of the stock, reads as follows:

> "2. The capitalization of the consolidated company shall consist of 1,000,000 shares of common stock, such shares to be of no par value and all of one class. Of such authorized stock 631,012 shares *shall be issued in exchange for or replacement of the shares of common stock of the companies now outstanding,* and 45,000 shares shall be sold for cash, as hereinafter provided.

The stock then outstanding belonged to the stockholders. Pursuant to this agreement, two of the old corporations (The Raybestos Company and United States Asbestos Company) made their offer to the petitioner on September 9, 1929, containing the following (R. 82):

> "In exchange therefor, pursuant to said plan, (a) you will deliver to the Company or upon its order, certificates for 267,012 shares of your Common Stock without par value, which certificates will be delivered for account of and will represent shares of such stock issued directly to the holders of common stock of the Company, pursuant to said Plan, on the basis of two and one-fourth shares of your Common Stock for each share of the Company's common stock held by each such stockholder and you will issue, in lieu of any fraction of a share of your Common Stock issuable to any stockholder of the Company, non-voting and non-divi-

dend bearing Common Stock Scrip, exchangeable in amounts calling for one or more full shares for a certificate for such share or shares; provided that, if any stockholder of the Company whose stock shall not be voted in favor of such sale shall demand payment for his stock, you will in lieu of the delivery to the Company of the certificate for your Common Stock and Common Stock Scrip issuable to such stockholder on the basis above stated, pay to the Company for distribution to such stockholder pursuant to the Plan such sum in cash as in accordance with the laws of Connecticut shall be payable to him on account of his stock of the Company, such payment to be made forthwith upon the determination of its amount."

(It is to be noted that shares of stock are to be *issued* as distinct from *delivery* of certificates.)

Both offers were formally accepted in writing by petitioner.

There was ample reason for the provisions of the contract. It was undesirable that any one of the old corporations should receive a single block of stock equal, in case of one of the old corporations, to more than one-fourth of the stock of the new corporation, and in case of the other two, to more than one-third each. These large blocks of stock could have been held by the directors of the old corporations virtually in the capacity of voting trustees; it was deemed inadvisable that this should occur.

The Government's theory is that no matter what form the transaction assumed, the old corporations could not divest themselves of the right in the first instance to receive the consideration for the conveyance made by them. It is true that the companies could not have divested themselves of their assets in a manner which would have deprived their stockholders of their interests, but as long as those interests were protected, any legal means could have been adopted. The method which was used followed the established principle that two or more persons may contract for the benefit of third parties.

The stockholders were protected, and they were entitled to and did receive directly the consideration for the transfer of assets made by the two corporations for the benefit of the stockholders. Even though it be asserted that the rights of the stockholders were derived ultimately from their interests in the old corporations, no departmental assumption, deduction or legal fiction can be supplied to suggest that at any time there was a "transfer of the legal title of the right to receive the new shares." The legal title never vested in any one other than the stockholders themselves.

The answer to our question is found in the established principles of law governing contracts, corporations and the relationship between corporations and their stockholders. The facts involved and the principles cited in the following cases present a situation identical with that here under review:

a. *Fletcher* v. *Newark Telephone Co.*, 55 N. J. E. 47, 35 Atl. 903.

The Newark Mutual Telephone Company contracted with the defendant, Newark Telephone Company, to convey to the latter its entire business and franchises in consideration of the assumption of its liabilities and the agreement of the new corporation "to pay and deliver therefor to the stockholders of the said Mutual Telephone Company, the stock of the Newark Telephone Company, share for share, and issue the same to the stockholders of the said Mutual Telephone Company upon surrender of their certificates of stock" in the old corporation.

The plaintiff, who was a stockholder in the old corporation, sued the new corporation for the shares in it to which he was entitled. The defendant demurred, claiming among other things that the old corporation should have been made a party to the suit. The court held that the plaintiff was entitled to specific performance of the agreement and that it was not necessary to join as a party either the old corporation or any of the other stockholders. Concerning the

position of the old corporation, the court, speaking through Vice-Chancellor Pitney, later Justice of the United States Supreme Court, said:

> "Nor can I perceive any ground for holding that the old corporation is a necessary party to the suit. The bill alleges that it has stripped itself of all its property and franchises, by assignment and transfer to the defendant, and that the contract here sued upon was made directly with the complainant and the defendant. But if by the true construction of the contract, or if the proof should finally be that the contract was made between the two corporations, but for the benefit of the individual stockholders of the old company, I should still be inclined to the opinion that the old company was not a necessary party, and that each stockholder could sue individually for the stock due to him, basing this right upon the contract made by the old corporation for his or her benefit. No relief is or can be, upon the facts, prayed against the old corporation, nor is it at all affected by the result of the suit. Presumably, its stockholders accepted the promise of the new company to issue certificates of stock to them, severally, as full satisfaction of all claims they held against the old company. And certainly, upon the statement of the facts contained in the bill, the performance of the defendant's contract with each of the old stockholders is a complete discharge of any claim the old company may have against the new company."

The governing force of this case is patent. The old corporation conveyed to the new in consideration of the latter's issuance of its stock, share for share, directly to the stockholders of the old. One of the stockholders, failing to receive the shares to which he was directly entitled, sued the new corporation and the point was raised that the old corporation should have been joined. The court, speaking through one of its most eminent chancellors, held that the old corporation was in no way involved, that the stockholder could obtain nothing through it, and that the contract for the issuance of the shares could be discharged only by the

new corporation. In the light of this ruling, it can not be argued that *legal title* to the right to receive the new shares passed from the new corporation to the old and, in turn, from the old corporation to the stockholders. If *legal title* did so pass, the old corporation would have been not only a proper, but a necessary party and the court would have been bound to require it to be joined.

b. *Anthony* v. *American Glucose Co.*, 146 N. Y. 407; 41 N. E. 23.

This case involved a transfer by five corporations of all of their property and business to a newly organized corporation in consideration of the issuance directly to the stockholders of the old corporations of shares of stock in the new corporation. The necessary consent of all of the stockholders was obtained, and the agreement of the new corporation to issue its stock was coupled with the condition that the stockholders should surrender their stock in the old corporations. The plaintiff, a shareholder in one of the old corporations, sued the new corporation for the shares which were due him and the court held that he was entitled to a decree of specific performance. In construing one of the terms of the agreement between the corporations and the consent of the stockholders, the court said:

> "It did not mean, in violation of that agreement and in contempt of the specific authority conferred, that the new stock should be issued to the old companies. It could not mean anything so absurd. They were powerless to surrender the stock of their share holders in exchange; and to say that the new stock was to be issued to the shells of the corporations, having no stockholders to whom it could distribute it unless to the new Glucose Company itself, which alone could purchase the surrendered certificates, is to say that the individual corporators meant to throw away, and utterly waste their rights."

The court then adds:

"When the Glucose Company came into existence, it had made no contract, and was bound by no obligation. It was free to buy out the five companies on any terms it could secure, but chose to adopt those offered by such companies and their corporators. It knew accurately what those terms were, in all their details. Almost every member of the board had been a party to the arrangement, and participated in framing it; and so, with full knowledge, it adopted the contract offered, completely and as a whole. It formally accepted the preliminary contract made between the companies, knowing that it vested only on condition of an issue of stock to the corporators * * * It is thus a mistake to say that the Glucose Company dealt only with the five corporations. It dealt also, and necessarily, with the individual corporators whose consent it required, and obtaining it on condition of payment to them, and with full knowledge of that condition, became obligated to each stockholder to issue to him his due and proportionate share of Glucose Company stock * * *

"It is said that the four companies * * * should have been made parties defendant. I do not see that the corporations have the slightest interest in this controversy. The general term thinks them dissolved and dead. I do not go so far; but, if the hollow and empty shells had life enough to stand up before the court as parties defendant, at least they had no interest in the dispute, and are in no manner affected by its results.

This case is singularly apposite. In it, as in ours, the necessary consent of the stockholders was obtained and the agreement for the direct issuance of stock by the new corporation to the shareholders was conditioned upon the surrender of their shares in the old corporations. The court held that when the new corporation accepted offers made by the old corporations for the direct issuance of shares to the stockholders the right to receive the assets vested in the new corporation and the right to receive the shares vested in the shareholders, not in the old corporations. The old corporations are described as "hollow and

empty shells" without "life enough to stand up before the court as parties defendant" with "no interest in the dispute and . . . in no manner affected by its results." This decision has been frequently cited and never challenged. The ruling applied is recognized by the text writers as an established principle in the law of corporations. Applying the rule to this case, will it be contended that in spite of the fact that the old corporations had stripped themselves of their assets and were hollow and empty shells with no interest in the performance by the new corporation of its obligation to issue the shares, nevertheless, legal title to the shares had to pass in the first instance to the old corporations? Legal title not only did not but could not have passed to the old corporations. If it did not pass to them it could not have been transferred by them, and without the transfer of legal title there is no warrant for the imposition of the tax.

(4) The stamp transfer tax is an excise tax levied upon the privilege of making a transfer from one person to another. If no privilege be exercised, and no transfer be made, there is nothing to which the tax can attach. No liability can arise without an actual transfer as distinguished from a constructive or implied or hypothetical one.

Since title to the shares of stock in the new corporation was derived by the shareholders directly from the issuing corporation, it passed through the hands of no one else, and under the terms of the agreements it could not have done so. There is, therefore, nothing to which the tax could attach except the property itself, and this would result in an invalid direct tax. The suggestion that a step be supplied, which was not taken and which would have been contrary to contractual obligation and official requirement, is purely gratuitous.

A stamp tax is an indirect or excise tax arising out of the actual exercise of a privilege which a taxpayer is free to

exercise or not as he chooses. If the taxable privilege be actually exercised, the tax attaches. If not there is no liability. In our case, no intermediate transfer actually occurred, and no double privilege could have been exercised in a single transaction.

The Supreme Court has recognized in many decisions that stamp taxes and excise taxes, generally, are privilege taxes which are imposed only when the privilege sought to be taxed is actually exercised.

In *Thomas* v. *United States*, 192 U. S. 363, the court held that the stamp tax imposed by the Act of June 13, 1898, on a memorandum or contract of sale of a certificate of stock was an excise tax. In describing the tax, the court said:

> "There is no occasion to attempt to confine the words duties, imposts, and excises to the limits of precise definition. We think that they were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture, and sale of certain commodities, *privileges*, particularly business transactions, vocations, occupations, and the like. . . ."
>
> "The sale of stocks is a particular business transaction in the exercise of the *privilege* afforded by the laws in respect to corporations of disposing of property in the form of certificates. *The stamp duty is contingent on the happening of the event of sale, and the element of absolute and unavoidable demand is lacking.* As such it falls, as stamp taxes ordinarily do, within the second class of the forms of taxation."

In considering excise taxes, the courts have taken particular care to ascertain the precise privilege taxed in order to confine the application of the tax to the exact object contemplated by the statute.

Thus, in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, involving the Corporation Excise Tax Act of 1909, the court said:

> "The tax under consideration, as we have construed the statute, may be described as an excise upon the particular privilege of doing business in a corporate capacity, *i. e.*, with the advantages which arise from corpo-

rate or quasi corporate organization; or, when applied to insurance companies, for doing the business of such companies. As we said in the *Thomas* case, 192 U. S. 363, *the requirement to pay such taxes involves the exercise of privileges*, and the element of absolute and unavoidable demand is lacking. *If business is not done in the manner described in the statute, no tax is payable.*"

In *Nicol* v. *Ames*, 173 U. S. 509, in passing upon the tax imposed by the Act of 1898 on sales at exchanges, the court said:

> "In searching for proper subjects of taxation to raise moneys for the support of the Government, Congress must have the right to recognize the manner in which the business of the country is actually transacted; how, among other things, the exchange of commodities is effected; what facilities for the conduct of business exist; what is their nature, and how they operate; and *what, if any, practical and recognizable distinction there may be between a transaction which is effected by means of using certain facilities, and one where such facilities are not availed of by the parties in the same kind of a transaction.*"

In *Cliquot Club Co.* v. *U. S.*, 13 F. (2d) 655, the court considered the character of the beverage tax imposed by the Revenue Act of 1918, and said (p. 656):

> "That the tax is an excise laid upon the privilege of selling rather than of manufacturing beverages is clear. *It attaches only when there is a transfer of title in the commodity.*"

The opinion in *Knowlton* v. *Moore*, 178 U. S. 41, by Justice White, later Chief Justice, contains a most scholarly and comprehensive discussion of the nature of the tax on "Legacies and Distributive Shares of Personal Property" imposed by the War Revenue Act of June, 1898, and includes a valuable history of death duties and their application in this country and in Europe. Justice White said:

"Looking over the whole field, and considering death duties in the order in which we have reviewed them,—that is, in the Roman and ancient law, in that of modern France, Germany and other continental countries, in England and those of her colonies where such laws have been enacted, in the legislation of the United States and the several States of the Union,—the following appears: Although different modes of assessing such duties prevail, and although they have different accidental names, such as probate duties, stamp duties, taxes on the transaction, of the act of passing of an estate or a succession, legacy taxes, estate taxes, or privilege taxes, nevertheless tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being, and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested. . . . The thing forming the universal subject of taxation upon which inheritance and legacy taxes rest is the transmission or receipt, and not the right existing to regulate."

After holding that the legacy tax under review was not a direct tax but a duty or excise, the opinion considers the nature of excise taxes generally:

"Excises usually look to a particular subject, and levy burdens with reference to the act of manufacturing them, selling them, etc. They are or may be as varied in form as are the acts or dealings with which the taxes are concerned."

The case is a leading case, and it is of particular value in the consideration of our question for the importance which it attaches to the precise determination of the particular object or thing upon which an excise tax is imposed.

United States v. *Isham*, 17 Wall. 496, involved a provision of the Act of June 30, 1864, imposing a stamp tax of two cents on certain checks, drafts or orders drawn for a sum exceeding $10. The defendant issued annually orders in denominations of $1, $2, $3, $5 and $10, in an amount

aggregating about $100,000. No draft or order was issued for a sum exceeding $10, and it was contended that the instruments were taxable on the ground that the intentional use of small denominations was a device to avoid payment of the duty.

The court held first (p. 504) that:

> "The liability of an instrument to a stamp duty, as well as the amount of such duty, is determined by the form and face of the instrument, and cannot be affected by proof of acts outside of the instrument itself."

In response to the Government's contention that the instruments, although not actually within the definition of the act, might constructively be brought within it, the court said (p. 506):

> "If the device is carried out by the means of legal forms, it is subject to no legal censure. To illustrate: The Stamp Act of 1862 imposed a duty of two cents upon a bank check, when drawn for an amount not less than twenty dollars. A careful individual, having the amount of twenty dollars to pay, pays the same by handing to his creditors two checks of ten dollars each. He thus draws checks in payment of his debt to the amount of twenty dollars, and yet pays no stamp duty. This practice and this system he pursues habitually and persistently. While his operations deprive the Government of the duties it might reasonably expect to receive, it is not perceived that the practice is open to the charge of fraud. He resorts to devices to avoid the payment of duties, but they are not illegal. He has the legal right to split up his evidences of payment and thus to avoid the tax. The device we are considering is of the same nature."

Billings v. *United States*, 232 U. S. 261, is another case which illustrates the necessity of ascertaining precisely the subject matter of the tax in order to determine its proper incidence. It involves the duty imposed upon the use of foreign-built yachts owned by American citizens. The

court distinguishes between ownership and use and holds that the privilege exercised in the use of a foreign-built yacht is the basis of the tax. Whether the decision in the case be rested upon this ground or on the ground that the excise was properly levied as a luxury tax, the opinion demonstrates the broad proposition for which we are here contending, namely, that an excise tax is imposed upon a privilege and that it is only when the taxable privilege is actually exercised that the tax can be levied. The court said:

> "Upon what was it (the tax) assessed is the question. It seems difficult to answer it in clearer terms than does the text of the act when it provides that it shall be upon the use of the yachts with which the provision is concerned. But it is said to respond in the language of the act leaves the question virtually unanswered, since the extent of the use and its essential period are left wholly undetermined. But this is a misconception based upon a disregard of the fact that the word 'use' in the text is unqualified, from which it results that the recurrence of the tax is annual and depends upon two elements,—ownership or charter rights, as specified in the act, and use for any time during the year. It is to be observed that the provision deals with ownership, and distinguishes between ownership and use, since it bases the tax not upon the former, but upon the latter. From this it follows that *it is not ownership, but the election during the taxing period of the owner to take advantage of one of the elements which are involved in ownership,—the right to use which is the subject upon which the statute places the excise duty.* . . . While this construction in this case leads to the same conclusion as does that which the court below affixed to the statute, that is, that it taxed the privilege of use, or, in other words, the potentiality of using involved in ownership, inherently there is this fundamental difference between the interpretation we give and that which the lower court adopted, *since the privilege of use is purely passive (or subjective),—a right which necessarily pertains to ownership and must exist where there is ownership, as one may not obtain ownership without acquiring the privileges of use*

which ownership gives. The other, on the contrary, that is, use in the statutory sense; although it arises from ownership, is active (objective); that is, it is the outward and distinct exercise of a right which ownership confers, but which would not necessarily be exerted by the mere fact of ownership.'' (pp. 280-281.)

The cases we have reviewed involving excise taxes establish several propositions which are applicable to our case:

(1) The courts take the greatest care and make the most minute analysis to determine exactly what the statute taxes;

(2) An excise tax is levied on a particular act, or transaction, or a single element in a transaction, consisting in each case of the exercise of a privilege;

(3) The tax does not attach unless the precise act is present and the taxable privilege is actually exercised;

(4) The form of the transaction controls; and

(5) No tax is payable if the transaction takes a form which avoids a tax to which the transaction in another form would be subject.

The basis of the stamp tax sought to be applied in this case is the transfer of the legal title to the right to receive shares of stock. We believe we have shown that there was not and could not have been an actual transfer of the legal title to the right to receive the shares of stock of the New Jersey corporation.

(5) Cases involving this precise question have held that no tax was possible.

In circumstances similar to those involved in this action, three recent cases, two by Circuit Courts of Appeal, have decided against the government's claim that a transfer of a right to receive stock occurred, and held that the facts did not support the tax.

In *Minnesota Mining & Mfg. Co.* v. *Willcuts*, 2 F. Supp. 789, a Delaware corporation had been organized to take

over the assets of a Minnesota corporation. The transaction was effected by a surrender of Minnesota stock in exchange for Delaware stock issued directly to the stockholders of the Minnesota corporation through the agency of a committee. The government contended that since the Minnesota corporation had furnished the consideration for the issuance of the stock it had the primary right to receive the stock, and a tax upon an asserted transfer of that right to its stockholders was assessed and collected. The District Court for the District of Minnesota held that the Minnesota corporation had never acquired any right to receive the stock and could not have transferred any such right.

> "In connection with the stock in question, there was a single movement only. That was directly from the corporation issuing the certificates, the Delaware corporation, to the individuals who were entitled thereto under the arrangement made by the voluntary committee. There was no vesting in the Minnesota corporation, as such, of any right to, or interest in, or power of disposition as to, the stock in question. There were no 'sales * * * or transfers of legal title to shares or certificates of stock * * * or of legal title to rights to subscribe for or to receive such shares or certificates,' by the Minnesota company. The latter had no such legal title and no such rights. It could not make any such sales or transfers to others, and it made no attempt so to do. The tax, therefore, was unwarranted" (p. 791).

In *Westmoreland Coal Co.* v. *MacLaughlin*, 8 F. Supp. 963, a corporation made an offer to transfer its assets to a newly organized corporation in consideration of the issuance of its stock to the old corporation. The new corporation, instead of accepting this offer as it was made, resolved to take the assets and to issue the stock *to the stockholders* of the old corporation. The transaction was actually carried out on this basis. Here again the government insisted that the old corporation had the primary right to receive

the stock and that a transfer of that right to its stockholders had occurred and was subject to tax. The District Court for the Eastern District of Pennsylvania ruled otherwise:

> "It is quite clear that the plaintiff never acquired the right to receive the stock in question. It could only have gotten it by virtue of some contract binding on the Delaware corporation and there was no contract which gave it. True, the plaintiff had offered to transfer its assets in exchange for such right, but the reply was, 'No, we will accept your assets but we will give the stock to your stockholders, not to you,' and the plaintiff acquiesced. *It is perfectly competent for a corporation, with the consent of all its stockholders, to agree to sell its assets for a price and to stipulate that the price shall not be paid to it but to third parties, particularly where those third parties are the stockholders themselves.* Certainly, the plaintiff acquired an enforceable right as a result of its transaction with the Delaware corporation, but that right was not to receive shares of stock for itself, but to require them to be issued to its stockholders. This right, of course, was not transferred and is not taxable. Though not on all fours, the case of Minnesota Mining & Manufacturing Co. v. Willcuts (D. C.), 2 F. Supp. 789, is much closer in its facts than the Marconi Case" (p. 964).

This decision was affirmed, 73 F. (2d) 1004, by the Circuit Court of Appeals for the Third Circuit in a *per curiam* decision, as follows:

> "Trial by jury was waived, and the case formally submitted to the court. Holding that the stipulated facts sustain the court's findings, its judgment is affirmed on the reasoning of its opinion."

Shreveport-El Dorado Pipe Line Co. v. *McGrawl*, 63 F. (2d) 202 (C. C. A. 5), involved a reorganization in which a Louisiana corporation in exchange for the assets of a Delaware corporation, issued its capital stock proportionately to the stockholders of the Delaware corporation. The gov-

ernment's right to collect a stamp tax upon an asserted transfer of rights to receive stock was denied.

Coos Bay Lumber Company v. *McLaughlin*, No. 19,268-K, was decided in plaintiff's favor on November 22, 1934, by the United States District Court for the Northern District of California. The main issue involved was the same as in this case. Outstanding bonds of the Coos Bay Lumber Company had come into the possession of a bondholders' committee. The committee entered into a reorganization agreement with the Lumber Company which provided that the Company would issue its stock directly to a group of trustees for the bondholders in consideration of the surrender by the committee to the Company of the bonds held by it. The Government argued, as it does here, that the committee or the bondholders had the right to receive the stock upon surrender of the bonds and must be deemed to have transferred it to the trustees. The court held otherwise. The case was presented for the taxpayer by William Denman, now a member of the Circuit Court of Appeals for the Ninth Circuit.

Vortex Cup Company v. *United States*, 1935 C. C. H. paragraph 9582, was decided in plaintiff's favor on July 17, 1935, by the United States District Court for the Northern District of Illinois. The issue involved was the same as in this case.

Contrary rulings in clearly distinguishable cases are found in *Marconi Wireless Telegraph Co.* v. *Duffy*, 273 Fed. 197; *Consolidated Equities* v. *White*, 9 F. Supp. 145; and *Hormel & Co.* v. *United States*, 10 F. Supp. 623.

The agreements in each of these cases between the old corporation and the new corporation provide for issues of stock in the new corporation to the old corporation or its order. Thereafter the old corporation ordered that the stock be issued directly to its stockholders. In such cases a transfer of a right to receive stock may well have occurred. The situation is clearly distinguishable from this case in which

the agreement between the corporations provided in its inception for an issuance of stock directly to the stockholders of the old corporations; in such a case as this the old corporation acquires no right to receive stock and can transfer none.

The opinion in *United States* v. *Brown Fence and Wire Co.*, 9 F. Supp. 1008 (D. C. N. D. Ohio), indicates that the agreement provided for the issuance of the shares directly to the shareholders of the old corporation. The tax was upheld, evidently on reliance on the *Marconi* case as against the *Westmoreland* case in the District Court. As this case was decided on January 18, 1935, it is reasonable to assume that the affirmation of the *Westmoreland* case, on December 1, 1934, by the Circuit Court of Appeals for the Third Circuit, had not been called to the court's attention; at least, the court's only reference is to the decision of the District Court. This is the only case we know in which the ruling may be against us.

The cases cited by the Government in its brief, *United States* v. *Phellis*, 257 U. S. 156, and *Rockefeller* v. *United States*, 257 U. S. 176, are income tax cases and have no bearing on the present subject.

CONCLUSION.

The essence of this case lies in the fact that the Government has sought to tax "the transfer of the legal title to the right to receive stock"—a transfer which never took place. There never was any "right to receive stock" until September 9, 1929. That right was never "transferred" to the stockholders but on its creation was vested in the stockholders of the two predecessor corporations. The stockholders did not transfer this right. The stock was issued to them directly. Such was the nature of the transaction. Undoubtedly there was only one taxable transaction, the issuance of the stock itself. On that transaction the tax was paid. The New York courts hold under a stat-

ute almost identical with the Federal statute that, on original issue there cannot also attach liability for the transfer tax. *People* v. *Duffy-McInnerney Co.*, 106 N. Y. Supp. 878, 879; 122 App. Div. 336. The Court said:

> "A sale or a transfer cannot, except by forced interpretation, be held to include an original issuance of certificates, which are simply evidence of the interest of the subscribers in the corporation. *Until those certificates are once issued they cannot be made the subject of such sale or transfer as to bring them within the provisions of the act requiring them to pay the tax.*"

The Government's attempt to collect another tax upon the same transaction in the guise of a "transfer of the legal right to receive stock" cannot be sustained.

It is respectfully submitted that the judgment of said Court of Claims should be reversed by this Honorable Court.

CHARLES H. LEFEVRE,
Counsel for Petitioner.

Dated, Washington, D. C.
October 19, 1935.

APPENDIX A.

STATEMENT.

The findings of fact of the Court of Claims (R. 66-75) may be summarized as follows:

The petitioner is a New Jersey corporation, organized in 1929, with a total authorized capital stock of 1,000,000 shares of common stock (R. 66). For many years prior to petitioner's incorporation three separate and distinct corporations, namely, The Raybestos Company, a Connecticut corporation, The Manhattan Rubber Manufacturing Company, a New Jersey corporation, and the United States Asbestos Company, a Pennsylvania corporation, existed and carried on business; each was owned, controlled and operated by entirely distinct and different interests, stockholders and directors; none had any interest, direct or indirect, in the business, assets or properties of the others (R. 66).

On May 14, 1929, The Raybestos Company, The Manhattan Manufacturing Company, and the United States Asbestos Company entered into a written agreement, signed by the president of each company respectively, subject to the necessary action by directors and stockholders, which provided for the formation of a corporation (petitioner) to acquire all the assets and carry on the businesses of each of the three companies (R. 68). The agreement provided for the capitalization of the new corporation and for the basis of the issuance of its stock for or in replacement of stock of the three existing corporations (R. 68-69). The agreement appears in the Record at pages 6-9. The board of directors of each corporation approved the agreement. Thereafter, the agreement was submitted for approval or rejection to the stockholders of each of the corporations by means of form letters mailed to holders of common stock of the corporations, enclosing copies of a "Plan and Agreement", dated May 22, 1929 (R. 70). (Copies of the letters

and "Plan and Agreement" appear on pages 9-60 in the Record.) The agreement in the "Plan and Agreement" was between a committee of three, on the one hand, and such stockholders who should deposit their stock, on the other. The letters and the "Plan and Agreement" provided that a new corporation would acquire all the assets and liabilities of the three existing companies; the "Plan and Agreement" further provided that the assent of the stockholders thereto should be by the deposit of their stock certificates with the committee of three. The agreement further provided that when all the terms and conditions of the "Plan and Agreement" had been complied with "depositors will be entitled to receive, upon the consummation of the plan, and upon surrender of their certificates of deposit, the stock and scrip for fractions of shares of stock, of the New Company (but only as and when issued and ready for delivery) to which they shall be entitled pursuant to the terms and provisions of the plan and this agreement" (R. 70-71).

All the stockholders of each of the corporations approved the consummation of the plan as submitted, and each deposited his stock certificate or certificates with the appropriate Depository pursuant to the terms and conditions set forth in the "Plan and Agreement" (R. 71-72).

The petitioner was incorporated in New Jersey on July 5, 1929, assumed the obligations and liabilities, and acquired all the business and assets of the three older corporations (R. 72-73).

The business and assets of The Manhattan Rubber Manufacturing Corporation were acquired by a merger of that corporation with the petitioner under the provisions of the General Corporation Act (as amended) of New Jersey (R. 72). The petitioner issued 250,000 shares of the petitioner's stock (R. 72) ratably and directly to the stockholders of the outstanding 200,000 shares of The Manhattan Rubber Manufacturing Company common stock.

The business and assets of The Raybestos Company

were acquired by proper deeds, assignments, bills of sale, and other instruments executed and delivered by The Raybestos Company (R. 72-73). The petitioner issued 267,012 shares of the petitioner's stock ratably and directly to the stockholders of the outstanding 118,672 shares of The Raybestos Company common stock (R. 73). The transaction was in pursuance of the agreement dated May 14, 1929, the "Plan and Agreement" dated May 22, 1929, and pursuant to a contract entered into between the petitioner and The Raybestos Company dated September 9, 1929 (R. 73). The contract of September 9, 1929, provided that The Raybestos Company would transfer to the petitioner all its assets, business, and good will, and in exchange, that the petitioner would deliver "certificates" for 267,012 shares of petitioner's common stock "to the Company (The Raybestos Company) or upon its order * * * which certificates will be delivered for account of and will represent shares of such stock issued directly to the holders of common stock of the Company" (R. 73). (A copy of the contract of September 9, 1929 appears in the Record at pages 80-86.)

The business and assets of United States Asbestos Company were acquired by means of proper deeds, assignments, bills of sale, and other instruments executed and delivered by United States Asbestos Company. The petitioner issued 114,000 shares of the petitioner's stock, ratably and directly to the stockholders of the outstanding 100,000 shares of the United States Asbestos Company common stock (R. 73-74). The transaction was in pursuance of the agreement dated May 14, 1929, the "Plan and Agreement" dated May 22, 1929, and a contract entered into between the petitioner and United States Asbestos Company dated September 9, 1929 (R. 74). The contract of September 9, 1929, contained the same provisions, as adapted to United States Asbestos Company, as did the contract with The Raybestos Company (Record 74).

The petitioner paid a tax of five cents a share on each share of stock issued by it, which tax it concedes was legal-

ly imposed under Schedule A-2, Section 800 of the Revenue Act of 1926 (R. 75).

The United States Asbestos Company was dissolved on September 27, 1930 (R. 75). The Raybestos Company has not been dissolved but has continued in existence because of certain non-assignable patent rights (R. 75). The Manhattan Rubber Manufacturing Company was, as before stated, merged with the petitioner (R. 75).

On October 13, 1932, the petitioner was notified by letter from the Bureau of Internal Revenue that petitioner was subject to a transfer tax of two cents a share under Schedule A-3 of Section 800 of the Revenue Act of 1926 on the shares of its stock issued "direct to the individual shareholders" of The Raybestos Company and the United States Asbestos Company (R. 93). No claim was made for a tax on the shares acquired by the former stockholders of The Manhattan Rubber Manufacturing Company. The petitioner paid the tax of $7,620.24, with interest of $165.11, under protest on May 8, 1933 (R. 74). On May 15, 1933, the petitioner filed a claim for refund of the tax and interest on the ground that there had been "no real transfer of a corporate interest or of a right to acquire it," and that the tax did not attach (R. 74-75). The Commissioner rejected petitioner's claim for refund on December 12, 1933 (R. 75).

Petitioner filed in the Court of Claims, on March 4, 1935, its claim that the tax paid was illegally withheld from it. The Court of Claims dismissed the petition (R. 80).

The bare facts above, when summarized further, may be said to be: Three corporations agreed to transfer their assets, together with their liabilities, to a new corporation in consideration of the new corporation issuing its shares of stock ratably to the three corporations' stockholders who agreed to the surrender of their shares of stock in the old corporations upon their receiving in replacement stock in the new corporation.

APPENDIX B.

Statute Involved.

Revenue Act of 1926, c. 27, 44 Stat. 9, 99, 101:

SEC. 800. On and after the expiration of thirty days after the enactment of this Act there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters and things mentioned and described in Schedule A of this title, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, are written or printed, by any person who makes, signs, issues, sells, removes, consigns, or ships the same, or for whose use or benefit the same are made, signed, issued, sold, removed, consigned, or shipped, the several taxes specified in such schedule. The taxes imposed by this section shall, in the case of any article upon which a corresponding stamp tax is now imposed by law, be in lieu of such tax.)

* * * * * * * * *

SCHEDULE A.—STAMP TAXES

* * * * * * * * *

3. Capital stock, sales, or transfers: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to shares or certificates of stock or of profits or of interest in property or accumulations in any corporation, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not, on each $100 of face value or fraction thereof, 2 cents, and where such shares are without par or face value, the tax shall be 2 cents on the transfer or sale or agreement to sell on each share: Provided, That it is not intended by this title to impose a tax upon an agreement evidencing a deposit of certificates as collateral security for money loaned thereon, which certifi-

cates are not actually sold, nor upon the delivery or transfer for such purpose of certificates so deposited, nor upon mere loans of stock nor upon the return of stock so loaned: Provided further, That the tax shall not be imposed upon deliveries or transfers to a broker for sale, nor upon deliveries or transfers by a broker to a customer for whom and upon whose order he has purchased same, but such deliveries or transfers shall be accompanied by a certificate setting forth the facts:

* * *

(U. S. C. App., Title 26, Sec. 901.)

Regulations Involved.

Treasury Regulations 71 (1929 Edition), Article 35.

ART. 35. *Sales and transfers not subject to tax.*—The following transactions are not subject to the tax:

(*a*) The transfer of stock pursuant to a sale, where the previous memorandum of sale has been duly stamped.

(*b*) The sale or transfer of enemy-owned shares of stock in American corporations to or by the Alien Property Custodian.

(*c*) The surrender of certificates in exchange for other certificates representing the same or new stock, provided they are issued to the same holders.

(*d*) The surrender of the stock of the consolidating corporation in exchange for stock in the consolidated corporation, in the case of consolidation of two or more corporations.

(*e*) The transfer of the stock of a merged corporation in exchange for stock of the merging corporation at the time and as a part of a statutory merger is not subject to tax, nor is the substitution of new certificates for the certificates representing the old stock of the merging corporation.

(*f*) The surrender of stock for extinguishment or in exchange for new certificates to be issued without change of owernship.

(*g*) The transfer of certificates of stock from the decedent to the administrator or executor of the estate.

(*h*) The transfer of shares or certificates of stock

from the name of a deceased or resigned trustee to the name of a substituted trustee appointed in accordance with the terms of the trust agreement, which is a transfer resulting wholly by operation of law.

(*i*) An agreement evidencing a deposit of certificates as collateral security for money loaned thereon, which certificates are not actually sold, is not subject to tax, nor is the delivery or transfer for such purpose of the certificates so deposited, nor the mere loan nor return of stock so loaned subject to tax: *Provided*, That in each case the person making a transfer of such certificates shall make and sign a statement of the facts and attach it to the certificate.

(*j*) The transfer or delivery of certificates to a clearing house for the sole purpose of clearing or adjusting accounts, where no beneficial interest is vested in such clearing house and there has been no change of title or interest.

(*k*) The mere delivery of a certificate of stock by or on behalf of a customer to his broker solely for the purpose of enabling such broker to make a sale thereof for the customer where the broker has no ownership or interest therein, is not subject to stamp tax and does not require an exemption certificate. The transfer of a certificate of stock from the name of the owner thereof to the name of a broker, solely for the purpose of enabling such broker to make a sale thereof for the owner, is not subject to tax, provided the broker shall in every case, at the time of such transfer to him, make and sign a certificate stating that he has no ownership in such stock and that the transfer to him was made solely to enable him to sell the stock for the owner. Such certificate shall in every case be attached to the certificate of stock and presented to the transfer agent at the time such certificate of stock is surrendered for transfer and shall be preserved, together with the old certificate, by such transfer agent, for the inspection of the revenue officer.

(*l*) The mere delivery of a certificate of stock from a broker to his customer for whom he has purchased such certificate, and when such broker has no ownership or interest therein, is not subject to the stamp tax and does not require an exemption certificate. The trans-

fer of a certificate of stock from the name of a broker to the name of his customer for whom and upon whose order he has purchased such stock, where the tax has been paid upon the transfer of the stock to the broker, is not subject to tax, provided that the broker shall in every case, at the time of such transfer from him, make and sign a certificate stating that the transfer from the broker to his customer is made solely to complete the purchase made by such broker for such customer. Such certificate in every case shall be attached to the certificate of stock and presented to the transfer agent at the time such certificate of stock is surrendered for transfer, and shall be preserved, together with the old certificate, by such transfer agent for the inspection of the revenue officer.

(*m*) The certificates required by the two preceding paragraphs shall be in the following form:

(1) (In the case of a transfer to a broker)—

We hereby certify that we have no ownership or interest in * * * shares of the stock above transferred, the transfer by the owner to us being merely for the purpose of sale.

.....
(Broker sign here)

(2) (In the case of a transfer by a broker)—

We hereby certify that the transfer * * * of the within shares to the names indicated by t[illegible]star is made solely to complete the purchase made [illegible]s for our customer, and we have no ownership o[illegible]terest therein.

.....
(Broker sign here)

(*n*) No broker who has filed a certificate on the form given in paragraph (1) shall file a certificate on the form given in paragraph (2) with relation to the same transfer of shares of stock.

(*o*) A "call" is an agreement to sell and is taxable; but a transfer of a certificate of stock pursuant to the "call" is not taxable, being only a fulfillment of the original agreement. The seller shall execute and attach to the certificate of stock his certificate, which

shall be accepted by the transfer agent and shall be preserved by him for inspection of the revenue officer. The certificate here prescribed shall be in the following form:

> We hereby certify that the transfer of....shares of the within stock to.....has been made pursuant to a "call," and that the Federal stock transfer stamps for the transaction are affixed to such "call," which is in our possession.

(*p*) Where, under paragraph (*k*) of this article, a certificate of stock standing either in the name of the owner or any other person has been delivered by the owner thereof to a broker for sale, and subsequently, under paragraph (*l*) of this article, such certificate has been delivered by a broker to his customer for whom it is purchased and the tax has been paid upon the delivery of such certificate from the seller's broker to the buyer's broker, the transfer of such certificate of stock into the name of the buyer is not subject to tax: *Provided*, That either requisite stamps shall have been affixed to the certificate of stock upon its delivery to the buyer's broker or the memorandum of sale evidencing the transaction between the seller's broker and the buyer's broker, with the requisite stamps affixed thereto, shall have been attached to such certificate at such time and presented to the transfer agent at the time such certificate is surrendered for transfer. The old certificate, together with the memorandum of sale, if used, shall be preserved by such transfer agent for the inspection of the revenue officer.

(*q*) Transfers of shares or certificates of stock which result wholly by operation of law are not subject to the tax. Transfers of this character are those which the law itself will effect without any voluntary act of the parties, such as transfer of stock from decedent to executor.

(*r*) Where trustees hold as joint tenants upon the death of one title devolves upon the survivor. Such devolution constitutes a transfer by operation of law not subject to tax.

(*s*) Transfer of stock from maiden name to married name of stockholder.

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 850

RAYBESTOS-MANHATTAN, INC., PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court below (R. 76–79) is not yet reported.

JURISDICTION

The judgment of the court below was entered March 4, 1935 (R. 80). The petition for a writ of certiorari was filed April 6, 1935 (R. 94). The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925.

QUESTION PRESENTED

Whether, in the circumstances of this case, the consolidation plan followed by the corporations,

whereby under separate contracts of purchase providing for delivery of certificates of stock in the new corporation to the selling corporations or their orders the petitioner acquired the assets of two corporations, and issued stock therefor, on the order of the selling corporations, directly to the stockholders of the two corporations, involved a transfer subject to stamp tax under Section 800, Schedule A–3 of the Revenue Act of 1926.

STATUTE INVOLVED

The applicable statute is set forth in the Appendix (*infra*, pp. 12–13).

STATEMENT

The findings of fact of the Court of Claims (R. 66–75) may be summarized as follows:

The petitioner is a New Jersey corporation, organized in 1929, with a total authorized capital stock of 1,000,000 shares of common stock without par value, all of which are outstanding and have been issued as full-paid and nonassessable shares (R. 66). At the time of the incorporation of the petitioner and for many years prior thereto, three separate and distinct industrial corporations, namely, the Raybestos Company, a Connecticut corporation, the Manhattan Rubber Manufacturing Company, a New Jersey corporation, and the United States Asbestos Company, a Pennsylvania corporation, existed and were doing business, and each was owned, controlled and operated by en-

tirely distinct and different interests, stockholders and directors, and none had any interest, direct or indirect, in the business, assets or properties of the others (R. 66). A summary of the general character of each of the corporations, their assets and business, is set forth at pages 66–68 of the Record.

On May 14, 1929, the Raybestos Company, the Manhattan Rubber Manufacturing Company, and the United States Asbestos Company entered into a written agreement, signed by the president of each company respectively, subject to the necessary action by directors and stockholders, which provided for the formation of a consolidated company to acquire all the assets of each of the three companies (R. 68). The agreement provided for the capitalization of the consolidated company and for the basis of the issuance of its stock for or in replacement of stock of the three existing companies (R. 68–69). A memorandum of the agreement appears in the Record at pages 6–9.

The directors of each corporation approved the agreement at directors' meetings held by the separate corporations for that specific purpose, and thereafter the agreements as approved at these meetings were submitted to the stockholders of the corporations for approval or rejection (R. 70). The submission to stockholders was done by means of form letters mailed to holders of common stock of the corporations, enclosing copies of a "Plan

and Agreement", dated May 22, 1929, as applicable to each set of stockholders (R. 70). The letters and the "Plan and Agreement" provided that the new consolidated company would acquire all the assets and liabilities of the three existing companies, and provided for the deposit of stock by the stockholders as an assent to the "Plan and Agreement", and provided that when all the terms and conditions of the "Plan and Agreement" were complied with "depositors will be entitled to receive, upon the consummation of the plan, and upon surrender of their certificates of deposit, the stock and scrip for fractions of shares of stock, of the New Company (but only as and when issued and ready for delivery) to which they shall be entitled pursuant to the terms and provisions of the plan and this agreement" (R. 70–71). Copies of the letters sent to stockholders and the enclosures appear at pages 9–60 of the Record.

All the stockholders of each of the corporations approved the consummation of the plan as submitted, and each stockholder deposited his stock certificate or certificates with the appropriate depositary pursuant to the terms and conditions set forth in the "Plan and Agreement" dated May 22, 1929 (R. 71–72).

The petitioner was organized under the laws of the State of New Jersey on July 5, 1929, and acquired the entire business and assets of the three companies (R. 72–73). The acquisition of the business and assets of the Manhattan Rubber Man-

ufacturing Company was accomplished pursuant to a merger of the petitioner and the Manhattan Rubber Manufacturing Company, effected under the provisions of the General Corporation Act of the State of New Jersey as amended (R. 72). The petitioner issued ratably and directly to the individual owners of 200,000 shares of the Manhattan Rubber Manufacturing Company common stock, in replacement of their stock interests, 250,000 shares of the petitioner's stock (R. 72).

The entire property of the Raybestos Company was acquired by proper deeds, assignments, bills of sale, and other instruments executed and delivered by the Raybestos Company (R. 72–73). The petitioner issued directly to the stockholders of the Raybestos Company 267,012 shares of the petitioner's stock in the proportion of 2.25 shares for each share of stock owned in the Raybestos Company. (R. 73). The transactions were all in pursuance of the agreement dated May 14, 1929, the "Plan and Agreement" dated May 22, 1929, and pursuant to a contract entered into between the petitioner and the Raybestos Company dated September 9, 1929 (R. 73). The contract of September 9, 1929, provided that the Raybestos Company would transfer to the petitioner all its assets, business, and goodwill, and in exchange, that the petitioner would deliver 267,012 shares of its common stock "to the company or upon its order" (R. 73). A copy of the last-named contract appears in the Record at pages 80–86.

The petitioner acquired the entire assets of the United States Asbestos Company by means of proper deeds, assignments, bills of sale, and other instruments executed and delivered by the United States Asbestos Company in exchange for 114,000 shares of stock of the petitioner, issued directly to the stockholders of the United States Asbestos Company in the proportion of 1.14 shares for each share of stock owned in the United States Asbestos Company (R. 73–74). The transactions were all in pursuance of the agreement dated May 14, 1929, the "Plan and Agreement" dated May 22, 1929, and a contract entered into between the petitioner and the United States Asbestos Company dated September 9, 1929 (R. 74). The contract of September 9, 1929, contained the same provisions, as adapted to the United States Asbestos Company, as the contract with the Raybestos Company appearing at pages 80–86 of the Record (R. 74).

On October 13, 1932, the petitioner was notified by the Bureau of Internal Revenue that it was subject to a transfer tax of two cents a share under schedule A–3 of section 800 of the Revenue Act of 1926 on the number of shares of its capital stock issued as the consideration for the assets acquired from the Raybestos Company and the United States Asbestos Company, in the amount of $7,620.24 (R. 74). The petitioner paid the tax, together with interest of $165.11, making a total of $7,785.35, under protest on May 8, 1933 (R. 74). On May 15, 1933, the petitioner filed a claim for refund of

the tax and interest on the ground that in the circumstances involved there was no real transfer of a corporate interest or right to acquire it, and that the tax did not attach (R. 74–75). The Commissioner rejected this claim on December 12, 1933 (R. 75).

The petitioner paid a tax of five cents a share on each original issue of its stock, which, it is conceded, was legally imposed (R. 75).

The United States Asbestos Company was dissolved on September 27, 1930, but the dissolution was not made immediately because of pending litigation (R. 75). The Raybestos Company has not been dissolved but has continued in existence because of patent rights which are not assignable (R. 75). The Manhattan Rubber Manufacturing Company lost its identity by merging with the petitioner (R. 75).

The court below dismissed the petition (R. 80).

ARGUMENT

The court below has sustained the imposition of a stamp tax in this case on the ground that the Raybestos Company and the United States Asbestos Company transferred to their stockholders the right to receive the shares of petitioner under the plan of consolidation and agreements in connection therewith. The petitioner contends that no such tax could attach because the consolidating corporations never had the right to receive the petitioner's stock.

We submit that the decision of the court below is correct both in its reasoning and result, and that there is no direct conflict of authority. As pointed out by the court below, the statute is designed to raise revenue and is broad in its terms. Its comprehensive reach is accentuated by the specific exemptions granted in it. If the present transaction involved in substance the transfer by the consolidating corporations of a right to receive the shares of the petitioner, we submit that the tax properly attached although the shares were issued directly to the shareholders of the consolidating companies. In the circumstances of this case we think it is clear that each consolidating company had such a right and transferred it to its shareholders. The final contract of each corporation with the petitioner provided that the petitioner would, in exchange for the assets of each corporation, deliver its stock "to the company or upon its order" (R. 73). The contract thus recognized that the consolidating corporations were entitled to the consideration for the transfer of their assets, and the issuance of the petitioner's stock directly to their stockholders was therefore made on the order of the consolidating corporations. We submit that such an order clearly involved the transfer of the right to receive the stock and was subject to the tax.

The conclusion of the court below is supported by the well established principle that there is a substantial difference between a corporation and its stockholders, and that the ownership of the

corporate property is in the corporation and not the stockholders. See *Gibbons* v. *Mahon*, 136 U. S. 549, 557; *New Colonial Ice Co.* v. *Helvering*, 292 U. S. 435, 442. As applicable here, the principle makes it clear that the consolidating corporations, as distinguished from their shareholders, alone could convey the assets and become entitled to receive the consideration in the form of shares in the petitioner corporation. The stockholders received the stock only as a result of the transfer to them of the right to receive it. That transfer, we submit, is taxable. *Marconi Wireless Telegraph Co.* v. *Duffy*, 273 Fed. 197 (N. J.); *Consolidated Equities, Inc.* v. *White*, 9 F. Supp. 145 (Mass.).[1]

The petitioner cites only two cases from Circuit Courts of Appeals, which under Rule 38, par. 5(b) of this Court, could be considered as creating a conflict of authority. *Shreveport-El Dorado Pipe Line Co.* v. *McGrawl*, 63 F. (2d) 202 (C. C. A. 5th); *MacLaughlin* v. *Westmoreland Coal Co.*, 73 F. (2d) 1004 (C. C. A. (3rd), affirming 8 F. Supp. 963 (E. D. Pa.) on opinion below. We of course do not support the result reached in either of those cases. We believe that a proper application of the rule for which we contend would have resulted in a decision in favor of the tax in the

[1] The Treasury Regulations have not provided for the instant case, but other rulings of the Bureau of Internal Revenue indicate a practice of taxing a transfer in such a transaction as this. Reg. 71, Art. 34; G. C. M. 7542, IX–1 Cumulative Bulletin 392; G. C. M. 11904, XII–1 Cumulative Bulletin 434.

circumstances presented in each of those cases, and, in our view, the imposition of the tax should not be rendered improper by a formal change in the procedure of accomplishing substantially the same result. However, we submit that the two cases are readily distinguishable from the case at bar. Both differ from the present case in that a change of domicile of one corporation was the only objective there, while, here, three corporations combined, each contributing assets, and produced an enlarged and greatly altered enterprise. The reasoning of the opinion in *Shreveport-El Dorado Pipe Line Co.* v. *McGrawl, supra,* establishes the basis for this distinction, for there the court held that Congress did not intend to impose the tax where there was no real transfer of a corporate interest, each stockholder after the transaction owning substantially the same corporate interest he owned before. In *MacLaughlin* v. *Westmoreland Coal Co., supra,* the ruling was made to depend upon the construction of the agreement between the old and the new corporation, the court concluding that, under the agreement, the old corporation never had a vested right to receive the shares of the new corporation but that the right was given in the first instance to the shareholders. Neither of the cases can be said to be in direct conflict with the case at bar. Certain District Courts have distinguished the cases and sustained the stamp tax in similar circumstances. *George A. Hormel & Co.* v. *United States,*

printed in 1935 Prentice Hall, Vol. I, p. 1053 (Minn.); *United States* v. *Brown Fence & Wire Co.* (N. D. Ohio), printed in 1935 Prentice Hall, Vol. I, p. 745; *Consolidated Equities, Inc.* v. *White, supra.*

CONCLUSION

Although the principle involved in the case at bar presents a question of importance in the administration of the stamp tax, we feel justified in opposing the petition in the instant case on the ground that the decision below is clearly correct and that there is no direct conflict of authority. We submit, therefore, that the petition should be denied.

Respectfully submitted.

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FRANK J. WIDEMAN,
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Attorney.

MAY 1935.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9, 99, 101:

SEC. 800. On and after the expiration of thirty days after the enactment of this Act there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, are written or printed, by any person who makes, signs, issues, sells, removes, consigns, or ships the same, or for whose use or benefit the same are made, signed, issued, sold, removed, consigned, or shipped, the several taxes specified in such schedule. The taxes imposed by this section shall, in the case of any article upon which a corresponding stamp tax is now imposed by law, be in lieu of such tax.

* * * * *

SCHEDULE A—STAMP TAXES

* * * * *

3. Capital stock, sales or transfers: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to shares or certificates of stock or of profits or of interest in property or accumulations in any corporation, or to rights to subscribe for or to receive such shares or certificates, whether made upon or

shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not, on each $100 of face value or fraction thereof, 2 cents, and where such shares are without par or face value, the tax shall be 2 cents on the transfer or sale or agreement to sell on each share: *Provided,* That it is not intended by this title to impose a tax upon an agreement evidencing a deposit of certificates as collateral security for money loaned thereon, which certificates are not actually sold, nor upon the delivery or transfer for such purpose of certificates so deposited, nor upon mere loans of stock nor upon the return of stock so loaned: *Provided further,* That the tax shall not be imposed upon deliveries or transfers to a broker for sale, nor upon deliveries or transfers by a broker to a customer for whom and upon whose order he has purchased same, but such deliveries or transfers shall be accompanied by a certificate setting forth the facts: * * * (U. S. C. App., Title 26, Sec. 901.)

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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 20

RAYBESTOS-MANHATTAN, INC., PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court below (R. 76–79) is reported in 10 F. Supp. 130.

JURISDICTION

The judgment of the court below was entered March 4, 1935 (R. 80). The petition for a writ of certiorari was filed April 6, 1935 (R. 94), and was granted May 20, 1935 (R. 94). The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

In accordance with a plan of consolidation the petitioner acquired the assets of two corporations under separate contracts of purchase providing for delivery of certificates of stock in the petitioner to the selling corporations or their orders, and issued stock directly to the stockholders of the two corporations. The question presented is whether the transaction involved a transfer subject to stamp tax under Section 800, Schedule A–3 of the Revenue Act of 1926.

STATUTE INVOLVED

The applicable statute is set forth in the Appendix (*infra*, pp. 19–20).

STATEMENT

The findings of fact of the Court of Claims (R. 66–75) may be summarized as follows:

The petitioner is a New Jersey corporation, organized in 1929, with a total authorized capital stock of 1,000,000 shares of common stock without par value, all of which are outstanding and have been issued as full-paid and nonassessable shares (R. 66). At the time of the incorporation of the petitioner and for many years prior thereto, three separate and distinct industrial corporations, namely, the Raybestos Company, a Connecticut corporation, the Manhattan Rubber Manufacturing Company, a New Jersey corporation, and the United States Asbestos Company, a Pennsylvania corporation, existed and were doing business, and

each was owned, controlled, and operated by entirely distinct and different interests, stockholders, and directors, and none had any interest, direct or indirect, in the business, assets or properties of the others (R. 66). A summary of the general character of each of the corporations, their assets, and business is set forth at pages 66–68 of the Record.

On May 14, 1929, the Raybestos Company, the Manhattan Rubber Manufacturing Company, and the United States Asbestos Company entered into a written agreement, signed by the president of each company, respectively, subject to the necessary action by directors and stockholders, which provided for the formation of a consolidated company to acquire all the assets of each of the three companies (R. 68). The agreement provided for the capitalization of the consolidated company and for the basis of the issuance of its stock for or in replacement of stock of the three existing companies (R. 68–69). The memorandum of agreement appears in the Record at pages 6–9.

The directors of each corporation approved the agreement at directors' meetings held by the separate corporations for that specific purpose, and thereafter the agreements as approved at these meetings were submitted to the stockholders of the corporations for approval or rejection (R. 70). The submission to stockholders was done by means of form letters mailed to holders of common stock of the corporations, enclosing copies of a "Plan and Agreement", dated May 22, 1929, as applicable

to each set of stockholders (R. 70). The letters and the "Plan and Agreement" provided that the new consolidated company would acquire all the assets and liabilities of the three existing companies, and provided for the deposit of stock by the stockholders as an assent to the "Plan and Agreement", and provided that when all the terms and conditions of the "Plan and Agreement" were complied with "depositors will be entitled to receive, upon the consummation of the plan, and upon surrender of their certificates of deposit, the stock and scrip for fractions of shares of stock, of the New Company (but only as and when issued and ready for delivery) to which they shall be entitled pursuant to the terms and provisions of the plan and this agreement" (R. 70–71). Copies of the letters sent to stockholders and the enclosures appear at pages 9–60 of the Record.

All the stockholders of each of the corporations approved the consummation of the plan as submitted, and each stockholder deposited his stock certificate or certificates with the appropriate depositary pursuant to the terms and conditions set forth in the "Plan and Agreement" dated May 22, 1929 (R. 71–72).

The petitioner was organized under the laws of the State of New Jersey on July 5, 1929, and acquired the entire business and assets of the three companies (R. 72–73). The acquisition of the business and assets of the Manhattan Rubber Manufacturing Company was accomplished pursuant to a

merger of the petitioner and the Manhattan Rubber Manufacturing Company, effected under the provisions of the General Corporation Act of the State of New Jersey as amended (R. 72). The petitioner issued ratably and directly to the individual owners of 200,000 shares of the Manhattan Rubber Manufacturing Company common stock, in replacement of their stock interests, 250,000 shares of the petitioner's stock (R. 72). This transaction is not involved in the present controversy.

The entire property of the Raybestos Company was acquired by proper deeds, assignments, bills of sale, and other instruments executed and delivered by the Raybestos Company (R. 72–73). The petitioner issued directly to the stockholders of the Raybestos Company 267,012 shares of the petitioner's stock in the proportion of 2.25 shares for each share of stock owned in the Raybestos Company (R. 73). The transactions were all in pursuance of the agreement dated May 14, 1929, the "Plan and Agreement" dated May 22, 1929, and pursuant to a contract entered into between the petitioner and the Raybestos Company dated September 9, 1929 (R. 73). The contract of September 9, 1929, provided that the Raybestos Company would transfer to the petitioner all its assets, business, and goodwill, and in exchange, that the petitioner would deliver 267,012 shares of its common stock "to the company or upon its order" (R. 73). A copy of the last-named contract appears in the Record at pages 80–86.

The petitioner acquired the entire assets of the United States Asbestos Company by means of proper deeds, assignments, bills of sale, and other instruments executed and delivered by the United States Asbestos Company in exchange for 114,000 shares of stock of the petitioner, issued directly to the stockholders of the United States Asbestos Company in the proportion of 1.14 shares for each share of stock owned in the United States Asbestos Company (R. 73–74). The transactions were all in pursuance of the agreement dated May 14, 1929, the "Plan and Agreement" dated May 22, 1929, and a contract entered into between the petitioner and the United States Asbestos Company dated September 9, 1929 (R. 74). The contract of September 9, 1929, contained the same provisions, as adapted to the United States Asbestos Company, as the contract with the Raybestos Company appearing at pages 80–86 of the Record (R. 74).

On October 13, 1932, the petitioner was notified by the Bureau of Internal Revenue that it was subject to a transfer tax of two cents a share under Schedule A–3 of Section 800 of the Revenue Act of 1926 on the number of shares of its capital stock issued as the consideration for the assets acquired from the Raybestos Company and the United States Asbestos Company, in the amount of $7,620.24 (R. 74). The petitioner paid the tax, together with interest of $165.11, making a total of $7,785.35, under protest on May 8, 1933 (R. 74). On May 15, 1933, the petitioner filed a claim for

refund of the tax and interest on the ground that in the circumstances involved there was no real transfer of a corporate interest or right to acquire it, and that the tax did not attach (R. 74–75). The Commissioner rejected this claim on December 12, 1933 (R. 75).

The petitioner paid a tax of five cents a share on each original issue of its stock, which, it is conceded, was legally imposed (R. 75).

The United States Asbestos Company was dissolved on September 27, 1930, but the dissolution was not made immediately because of pending litigation (R. 75). The Raybestos Company has not been dissolved but has continued in existence because of patent rights which are not assignable (R. 75). The Manhattan Rubber Manufacturing Company lost its identity by merging with the petitioner (R. 75).

The court below dismissed the petition (R. 80).

SUMMARY OF ARGUMENT

The tax is imposed upon transfers of legal title to "rights to subscribe for or to receive" shares of stock. The well-established principle that the ownership of corporate property is in the corporation and not in the stockholders makes it clear that when the consolidating corporations sold their assets, the corporations and not the stockholders acquired the right to receive the new stock as the consideration, and transferred that right to their stockholders. The distinction between a corpora-

tion and its stockholders is a substantial one that is not to be disregarded for tax purposes except in unusual circumstances.

The propriety of the tax, therefore, does not depend upon whether the stockholders' capital interests have been altered. The statute intends to reach all transfers, except those specifically exempted, irrespective of considerations involving the interests of the holders.

Nor should the tax depend upon the terms of the contract, because such a method for determining the tax ignores the substance of the operation in favor of unessential formalities.

But even if the tax depends upon the terms of the contract, a tax is proper here, for the agreements under which the consolidation in the case at bar took place recognized the existence in the consolidating corporations of the right to receive the petitioner's stock. Especially is this true of the final contracts under which the petitioner acquired the assets of the consolidating corporations and issued its stock to their stockholders. Each such contract provided that the petitioner would deliver to each consolidating company, or "upon its order", shares of stock to be delivered to the stockholders.

Finally, there was involved here, not a mere change of domicile of the corporation, but a consolidation of three corporations into an enlarged and greatly altered enterprise.

ARGUMENT

I

THE CONSOLIDATING CORPORATIONS, BY TRANSFERRING THEIR CORPORATE ASSETS TO THE PETITIONER, BECAME ENTITLED TO RECEIVE THE PETITIONER'S STOCK. THE SHAREHOLDERS BECAME ENTITLED TO THE STOCK ONLY UPON TRANSFER TO THEM OF THE RIGHT TO RECEIVE IT

Section 800, Schedule A–3, of the Revenue Act of 1926, *infra*, p. 19, provides for a stamp tax upon transfers of legal title to "rights to subscribe for or to receive" shares or certificates of stock in any corporation, "whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, * * *."

The Commissioner imposed a tax when the petitioner acquired the assets of the Raybestos-Company and the United States Asbestos Company, and issued as consideration therefor 381,012 shares of common stock direct to the individual shareholders of the vendor corporations, on the ground that the vendor corporations had the right to receive the shares and transferred that right to their shareholders.[1] The court below upheld the tax on the same ground.

[1] The case at bar involves no question of a tax arising from the issue of stock to the stockholders of the Manhattan Rubber Manufacturing Company which merged with the petitioner under New Jersey law (see R. 76). So far as the record shows no transfer tax was imposed with respect to that transaction.

Congress has for a long time placed a tax upon transfers of shares of stock in order to raise revenue. Act of June 13, 1898, c. 448, 30 Stat. 448, 458, Schedule A; Revenue Act of 1914, c. 331, 38 Stat. 745, 759, Schedule A. The terms of the statute are broad, evidencing clearly a purpose to reach transfers whether they take the ordinary form of sales or not. Cf. *Provost* v. *United States*, 269 U. S. 443, 458–459. The exemptions in the statute are specific, serving to give emphasis to the comprehensive scope of the law. The Treasury Regulations have been drafted to give the statute its intended broad application. Reg. 40 (1919, 1922, 1924 eds.), Art. 12; Reg. 71, Art. 34, relative to Revenue Act of 1926.

The rule which we contend should be applied in this case is that when A corporation by agreement transfers its assets to B corporation in consideration for the issuance of stock by B to stockholders of A, the transferor corporation acquires the right to receive the issued shares which by the agreement it contemporaneously transfers to its stockholders. The above follows, we submit, from the well-established principle that the ownership of the corporate property is in the corporation and not in its stockholders. *Gibbons* v. *Mahon*, 136 U. S. 549, 557. The corporation, therefore, as distinguished from its stockholders, is entitled to the consideration upon the sale of the corporate assets. The distinction between the corporation and its stockholders is a substantial one for tax purposes and is to be dis-

regarded only in exceptional situations. *New Colonial Co.* v. *Helvering*, 292 U. S. 435, 442. It is not to be disregarded simply because the stock is issued directly to the stockholders of the vendor corporation. *Rockefeller* v. *United States*, 257 U. S. 176, 182–183. Therefore, the consolidating corporations in the case at bar became entitled to receive the shares of the petitioner issued in consideration for the transfer of the assets of the corporation to it. The shareholders of the consolidating corporations secured the new stock only by means of a transfer of the right to receive it. That transfer, we submit, the statute intended to tax.

The Treasury Department has consistently applied the rule adopted by the court below and has laid a tax upon transactions in which the shares of a new corporation are issued directly to the stockholders of consolidating corporations, G. C. M. 7542, IX–1 Cumulative Bulletin 392; G. C. M. 11904, XII–1 Cumulative Bulletin 434. The courts have not always upheld the practice. In *Shreveport-El Dorado Pipe Line Co*, v. *McGrawl*, 63 F. (2d) 202 (C. C. A. 5th), it was held that the statute did not impose the tax where, although one corporation exchanged its assets for the stock of a new corporation issued directly to the shareholders of the old corporation, the transaction involved was intended only to change the corporate domicile. The reasoning of the court was that in such circumstances "there is no real transfer of a corporate interest or of a right to acquire it where, after the consum-

mation of the reorganization, each stockholder legally owns substantially the same corporate interest which he owned before" (p. 205). We submit, however, that Congress did not intend so to limit the application of the statute, but on the contrary intended to tax all transfers whether the stockholders' capital interest was materially changed or not. *George A. Hormel & Co.* v. *United States*, 10 F. Supp. 623 (Minn.). Indeed the statute taxes the transfer even though the holder is not entitled "in any manner to the benefit of such stock, interest, or rights", thus further evidencing the intention to reach every manner of transfer. Schedule A–2, imposing a tax upon the issuance of capital stock, where, we submit, one would particularly expect to find exemption if Congress intended to lay no tax when the stockholders' interests were not changed by the transaction, provides for the tax on each original issue "whether on organization or reorganization." Even the issuance of a stock dividend is subject to tax under Schedule A–2. Reg. 40, Art. 4; Reg. 71, Art. 26.

The cases relied upon in the *Shreveport-El Dorado* decision were concerned with the question of whether in the circumstances presented the shareholders obtained any taxable income from the receipt of new shares exceeding in value the cost of the shares surrendered. See *Weiss* v. *Stearn*, 265 U. S. 242; cf. *Marr* v. *United States*, 268 U. S. 536. No such question relating to the power of Congress to lay the tax is present here, and no doubt

concerning the constitutional validity of the tax imposed here impels a construction of the statute that would exclude the tax.

The petitioner argues that the stockholders of the Raybestos Co. and the United States Asbestos Co. simply replaced their stock with shares of the petitioner, and that there was no sale of assets (Br. pp. 4–8). As urged elsewhere in this brief, we think that there was a sale of assets. But even if the transaction is to be described as the petitioner contends, we submit that it would involve a transfer tax. In the petitioner's view of the matter, the petitioner acquired the old stock in exchange for its stock (see Br. p. 5), in other words, the petitioner purchased the stock of the other companies. Such a purchase, we submit, would involve a taxable transfer of the shares from the shareholders to the petitioner, for in connection with consolidations the Treasury Regulations have exempted nothing more than the "surrender" of the stock of the consolidating corporations. Reg. 40, Art. 13; Reg. 71, Art. 35.

In *MacLaughlin* v. *Westmoreland Coal Co.*, 73 F. (2d) 1004 (C. C. A. 3d), affirming 8 F. Supp. 963 (E. D. Pa.), on opinion below, it was held that no tax was payable when one corporation transferred its assets to a new corporation under a contract, which, as distinguished from the original offer of the vendor corporation to exchange assets for stock, provided that upon the delivery of the assets the new corporation would issue stock directly to the

stockholders of the old corporation. The court based its decision upon its construction of the contract. We submit that such considerations should be rejected as a basis for determining whether a tax is proper, for they make the imposition of the tax depend upon the formalities of the transaction rather than upon the substance of what was accomplished. It concedes that if the contract technically recognizes the corporation's right to receive the stock, the tax must attach; but if the parties produce the same result without taking cognizance of the intermediate step in the operation, they may escape the tax. We submit that the form in which the plan of action is cast cannot obscure its substance for tax purposes. *United States* v. *Phellis*, 257 U. S. 156; *Rockefeller* v. *United States*, *supra*.

II

EVEN IF THE PROPRIETY OF THE TAX DEPENDS UPON THE TERMS OF THE CONTRACT, THE TAX WAS CORRECTLY IMPOSED IN THIS CASE

If the propriety of the tax is to be determined by the provisions of the contracts under which the parties acted in effecting the consolidation, as was held in *MacLaughlin* v. *Westmoreland Coal Co.*, *supra*, nevertheless we submit that the tax should be imposed here.

The original agreement of May 14, 1929 (R. 6–9), which was subject to approval by the stockholders, clearly recognized that the assets belonged to the consolidating corporations. The same is true

of the "Plan and Agreement" and accompanying letters (e. g., R. 9–26). The contract of September 9, 1929 (R. 80–86), which was the final binding basis for the consolidation, provided that in exchange for the assets of each consolidating company, the petitioner *"will deliver to the Company or upon its order"* certificates of stock, "which certificates will be delivered for account of and will represent shares of such stock issued directly to the holders of common stock of the Company" (see R. 82). This provision, we submit, states in effect that the delivery of the petitioner's stock direct to the stockholders of the consolidating corporations was to be made pursuant to the order of those corporations. The covering letter accompanying the final contract (R. 80) also expresses the substance of the matter as understood by the parties when it spoke of the sale of assets of each company to the petitioner as being "in exchange for shares of your stock to be distributed to the stockholders of the Company pursuant to the said Plan." Still further evidence of the intention of the parties appears in the final contract where it is provided that, if any stockholder not voting for the plan demanded payment for his stock, the petitioner would "in lieu of the delivery to the Company of the certificate for your [the petitioner's] Common Stock and Common Stock Scrip issuable to such stockholder on the basis above stated, pay to the Company for distribution to such stockholder pur-

suant to the Plan such sum in cash as in accordance with the laws of Connecticut shall be payable to him" (R. 82).

We submit, therefore, that pursuant to the provisions of the contracts the petitioner's stock was issued directly to the stockholders of the consolidating corporations on orders of each, and that the execution of those orders constituted a transfer of the right to receive the shares. Cf. *Marconi Wireless Telegraph Co.* v. *Duffy*, 273 Fed. 197 (N. J.).

White v. *Consolidated Equities*, 78 F. (2d) 435 (C. C. A. 1st), is to be distinguished. There individual subscribers bought voting-trust certificates from brokers who were empowered to sell such certificates. The stock was issued directly to voting trustees. It was held that there was no taxable transfer of a right to the stock from the subscribers to the trustees, since the subscribers did not come in contact with the corporation and contracted only for the voting-trust certificates. The case, therefore, is not inconsistent with the case at bar where the petitioner was a party to the contracts providing, as we contend, for the transfer that has been taxed.

III

EVEN IF CORRECTLY DECIDED, THE SHREVEPORT-EL DORADO PIPE LINE CO. V. M'GRAWL CASE DOES NOT CONTROL THE CASE AT BAR

The consolidation here accomplished much more than a mere change of corporate domicile. It produced a much larger enterprise than formerly ex-

ated in any of the corporations, by combining the assets of three corporations. A Connecticut, a Pennsylvania, and a New Jersey corporation were brought together in a new corporation in New Jersey. The new shares represented an interest in property and in an undertaking that the former shares did not.

As the record shows, the Raybestos Co. and the United States Asbestos Co. each owned extensive properties (R. 67, 68). The Manhattan Rubber Manufacturing Co. was engaged in the manufacture of products different from the other two companies (R. 67–68). Thus, the manufacture of asbestos products and mechanical rubber goods was combined in the new corporation. Furthermore, it appears that the stockholders of the old corporations did not receive all the petitioner's shares, for 45,000 shares were sold for cash at $30 a share in order to retire existing preferred stock of the old companies, and for other purposes. And, obviously, with the retirement of the preferred stock the new corporation presented a capital structure different from that of the old companies. Finally, the shares of the petitioner were without par value, while those of the Raybestos Co. and Manhattan Rubber Manufacturing Co. had been shares of $25 par value. We submit, therefore, that the present case is not within the decision in *Shreveport-El Dorado Pipe Line Co.* v. *McGrawl, supra,* even if the rule there stated be assumed correct. *Consolidated Equities* v. *White,* 9 F. Supp. 145 (Mass.). The rule would not apply here for the reason stated

by this Court in *Marr* v. *United States, supra* (pp. 541–542):

> The case at bar is not one in which after the distribution the stockholders have the same proportional interest of the same kind in essentially the same corporation.

CONCLUSION

The consolidating companies, as distinguished from their stockholders, were entitled to receive the consideration for the sale of corporate assets to the petitioner. That consideration was the issuance of stock by the petitioner. The stockholders of the consolidating companies acquired the stock only by a transfer to them from the consolidating corporations of their right to receive the stock.

It is immaterial whether the consolidation changed in any essentials the former corporate enterprise, though substantially changed here. And further, the tax is proper in this case in view of the provisions of the contracts under which the consolidation took place.

The judgment of the court below should be affirmed.

Respectfully submitted.

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OCTOBER 1935.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9, 99, 101:

SEC. 800. On and after the expiration of thirty days after the enactment of this Act there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, are written or printed, by any person who makes, signs, issues, sells, removes, consigns, or ships the same, or for whose use or benefit the same are made, signed, issued, sold, removed, consigned, or shipped, the several taxes specified in such schedule. The taxes imposed by this section shall, in the case of any article upon which a corresponding stamp tax is now imposed by law, be in lieu of such tax.

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SCHEDULE A.—STAMP TAXES

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3. Capital stock, sales or transfers: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to shares or certificates of stock or of profits or of interest in property or accumulations in any corporation, or to rights to subscribe for or to receive such shares or certificates, whether made upon or

shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not, on each $100 of face value or fraction thereof, 2 cents, and where such shares are without par or face value, the tax shall be 2 cents on the transfer or sale or agreement to sell on each share: *Provided*, That it is not intended by this title to impose a tax upon an agreement evidencing a deposit of certificates as collateral security for money loaned thereon, which certificates are not actually sold, nor upon the delivery or transfer for such purpose of certificates so deposited, nor upon mere loans of stock nor upon the return of stock so loaned: *Provided further*, That the tax shall not be imposed upon deliveries or transfers to a broker for sale, nor upon deliveries or transfers by a broker to a customer for whom and upon whose order he has purchased same, but such deliveries or transfers shall be accompanied by a certificate setting forth the facts: * * * *

(U. S. C. App., Title 26, Sec. 901.)

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SUPREME COURT OF THE UNITED STATES.

No. 20.—October Term, 1935.

Raybestos-Manhattan, Inc., Petitioner, vs. The United States. } On Writ of Certiorari to the Court of Claims.

[November 11, 1935.]

Mr. Justice Stone delivered the opinion of the Court.

In this case we granted certiorari, 294 U. S. —, to review a judgment of the Court of Claims to settle a doubtful point of federal law, of importance in the administration of the revenue acts, and to resolve a conflict of the decision below with that of the Court of Appeals for the Third Circuit in *MacLaughlin* v. *Westmoreland Coal Co.*, 73 F. (2d) 1004, affirming 8 F. Supp. 963, on opinion below.

The question presented is whether the issue by petitioner of its shares of stock to the stockholders of two other corporations in exchange for the assets of these corporations, pursuant to a plan for their consolidation, involved a "transfer" taxed by § 800 (A) (3) of the Revenue Act of 1926. 44 Stat. 9, 99, 101. The Court of Claims held that it did, and denied recovery of the tax, which petitioner had paid under protest. 10 Fed. Supp. 130.

Section 800, Schedule (A) (2) of the 1926 Act imposes a stamp tax at a specified rate on the original issue of shares of corporate stock. By § 800 (A) (3) a like tax is laid "On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to shares or certificates of stock or . . . of interest in property . . . in any corporation, or to rights to subscribe for or to receive such shares or certificates whether made upon or shown by the books of the corporation . . ., or by any paper or agreement or memorandum or other evidence of transfer of sale . . ." Section 800 imposes liability for the tax upon the transferor, the transferee and the corporation whose stock is transferred.

Petitioner was organized under the laws of New Jersey as a step in carrying out a plan and agreement for the consolidation of

three other corporations. Two of the corporations conveyed their property to petitioner in return for a specified number of its shares of captial stock, issued not to the two corporations, but directly to their stockholders in proportion to their holdings. The government and the taxpayer are not in accord as to the precise interpretation to be placed upon the contracts which resulted in the consolidation, but accepting the taxpayer's contention for purposes of decision, we assume that it was agreed by all concerned that the shares of petitioner were to be issued directly to the stockholders of the two corporations without further intervention by the latter.

Liability for the tax levied on the original issue of stock is conceded but it is denied that the transaction involved any taxable transfer within the purview of Schedule (A) (3). It is said that the petitioner was subject to the tax imposed by this schedule only if there was a transfer of the right to receive the stock to be issued by petitioner for the assets of the two corporations; that as neither of them was entitled, under the agreement, to receive the certificates for the newly issued shares, which were to be issued directly to their stockholders, neither corporation can be said to have transferred rights to receive stock. We think the statute is not to be read so narrowly.

The stock transfer tax is a revenue measure exclusively. Its language discloses the general purpose to tax every transaction whereby the right to be or become a shareholder, or to receive any certificate of any interest in its property is surrendered by one and vested in another. See *Provost* v. *United States*, 269 U. S. 443, 458, 459. While the statute speaks of transfers, it does not require that the transfer shall be directly from the hand of the transferor to that of the transferee. It is enough if the right or interest transferred is, by any form of procedure, relinquished by one and vested in another. Even the ownership of a share of stock, transfer of which is admittedly taxed, is not transferred directly from one to another as is title to a chattel or to real estate. Transfer of title to the shares is effected by a form of novation by which the right of the shareholder is surrendered to the corporation in return for its recognition of a new shareholder designated by the transferor and the issue to him of a new certificate of stock. It is relinquishment of the ownership for the benefit of another, and

the resultant acquisition of it by him which calls the statute into operation.

The subject of the tax is not alone the transfer of ownership in shares of stock. It embraces transfers of rights to subscribe for or receive shares or certificates whether made upon the books of the corporation "or by any paper, agreement, or memorandum or other evidence of transfer. . . ." In the present case the generating source of the right to receive the newly issued shares of petitioner was the conveyance to it of the property of each of the corporations to be consolidated. The new shares could not lawfully be issued to any other than the grantor corporation without its authority, and that authority could not be exercised for the benefit of third persons other than its own assenting stockholders. The consolidation agreement thus imposed the duty on petitioner to issue the new shares upon receipt of the property, and at the same time made disposition to the stockholders of the two corporations of the correlative right to receive the stock.

We think that this effective disposition of the right to receive the stock involved a taxable transfer quite as much as if the several legal relationships of the parties had been established at different times and by separate documents. It is not doubted that there would have been a taxable transfer if each corporation had conveyed its property to petitioner in exchange for its shares of stock to be issued as the grantor might direct, and had later ordered the certificates to be issued to its stockholders. The reach of a taxing act whose purpose is as obvious as the present is not to be restricted by technical refinements. But we do not discern even a technical difference of any significance between such a transaction and that now before us, where the same duty to issue the stock is created and the same shift of the beneficiaries of it is effected simultaneously in a single document. No convincing reason is suggested why the Act should be thought to tax the one and not the other.

The statute is thus not restricted in its application to rights to demand delivery of the stock such as the agreement vested in the stockholders of the two corporations. It embraces the more general one, inseparable from the transaction by which the obligation to issue the stock was created and which inhered in the two corporations by operation of law. Income is not any the less taxable

income of the taxpayer because by his command it is paid dire
to another in performance of the taxpayer's obligation to t
other. See No. 1, *Douglas* v. ~~Wilcox~~, decided this day; *Old Col*
Trust Co. v. *Commissioner*, 279 U. S. 716; *United States* v. *Bo*
& Maine R. R., 279 U. S. 732. Here the power to command t
disposition of the shares included the right to receive them and
exercise of the power which transferred the right is subject
the tax.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.